Petition

81-1849

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES EDWARD CURRIE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the prosecutor's action in presenting respondent with the alternative of pleading guilty to a misdemeanor charge or facing trial on a felony charge constitutes "prosecutorial vindictiveness" that requires dismissal of the felony indictment.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App. A, *infra*, 1a-4a), is reported at 667 F.2d 1251. The order of the court of appeals denying rehearing (App. C, *infra*, 6a) is not reported. The order of the district court dismissing the indictment (App. D, *infra*, 7a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 5a) was entered on August 17, 1981. A timely petition for rehearing was denied on February 10,

1982 (App. C, *infra*, 6a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 19, 1980, a superseding indictment was returned in the United States District Court for the Central District of California charging respondent with the felony of unlawfully disposing of a United States Treasury check with a value in excess of $100, in violation of 18 U.S.C. 641. The district court thereafter dismissed the felony indictment, finding that it had been vindictively brought after respondent invoked his right to be tried on a related misdemeanor charge that previously was filed against him. The court of appeals affirmed the order dismissing the superseding indictment.

1. During the course of an undercover operation, a Secret Service agent purchased a stolen United States Treasury check from respondent for $100. The check had a face value of $317. Based upon this transaction, the Assistant United States Attorney originally assigned to the case filed a misdemeanor information on April 23, 1980, charging respondent with the unauthorized sale of a Treasury check "having a value of less than one hundred dollars" (App. E, *infra*, 10a; App. F, *infra*, 20a). Respondent's arraignment on the misdemeanor charge was scheduled for April 28, 1980. However, respondent did not appear due to his incarceration at the Los Angeles County Jail on state charges (App. E, *infra*, 10a). Upon learning of respondent's whereabouts, the government promptly issued a writ of habeas corpus ad prosequendum and arraigned respondent on the misdemeanor charge on August 25, 1980. At that time, defense counsel was appointed, respondent pleaded not guilty, and his case was scheduled for jury trial

in magistrate's court on October 7, 1980 (App. E, *infra*, 10a).

Subsequently, respondent's case was reassigned to a successor prosecutor, Layn R. Phillips, on September 8, 1980 (App. F, *infra*, 15a).[1] The following day, the prosecutor contacted respondent's counsel and began assembling discovery materials requested by the defense. During conversations with defense counsel on September 17, the prosecutor inquired "whether the case would definitely go to trial" (App. E, *infra*, 11a). Defense counsel stated that he would discuss the matter with his client "to determine whether there was any possibility that he did not wish to proceed with trial" (*ibid.*). Later that same day, respondent's counsel informed the prosecutor that "the case would be proceeding to trial" (*ibid.*; see also App. F, *infra*, 16a).

Because it would be his first criminal jury trial in federal court, the prosecutor thereupon began to study the case in detail to prepare for the trial (App. F, *infra*, 16a). As a result of his preparation, the prosecutor discovered several errors in the information. First, the information failed to allege mens rea, an essential element under 18 U.S.C. 641. Second, the information charged that respondent had illegally sold a government check valued at less than one hundred dollars, when the check in question had a face value of over $300. In light of that fact, respondent's conduct constituted an offense under the felony provision of Section 641 rather than

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[1] Phillips had commenced employment as an Assistant United States Attorney on that same day (*ibid.*).

an offense under the misdemeanor provision (*id.* at 16a-17a).[2]

In addition to the errors on the face of the information, the prosecutor learned, through an examination of respondent's "rap sheet" (App. F, *infra*, 21a-27a), that respondent had "an extensive criminal record including felony convictions for burglary, armed robbery, and an assortment of misdemeanors covering a long period of years" (*id.* at 17a). So too, from his interviews with Secret Service agents, the prosecutor learned that respondent was believed to have participated in a scheme to "steal and sell numerous other treasury checks from the United States Post Office" (*ibid.*). In view of the mistakes in the information and respondent's extensive record of criminal misconduct, the prosecutor concluded "that the case had been incorrectly filed as a misdemeanor and instead warranted felony charges" (*ibid.*).

Thereafter, the prosecutor discussed his review of the facts and law with his colleagues and superiors, all of whom agreed that a superseding felony indictment should be obtained (*id.* at 17a-18a). Ultimately, the Chief of the Criminal Division in the United States Attorney's Office authorized a felony

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[2] In pertinent part, 18 U.S.C. 641 provides:

> Whoever * * * without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

indictment. However, "[b]ecause the case had been improperly filed as a misdemeanor," the Chief of the Criminal Division instructed the prosecutor "to inform defense counsel that the Government remained willing to accept a plea of guilty to the misdemeanor information" (*id.* at 18a).

The successor prosecutor telephoned defense counsel on September 19, 1980, and informed him that a superseding felony indictment would be sought based on a review of all of the factual and legal circumstances surrounding the case (App. E, *infra*, 11a-12a; App. F, *infra*, 18a). However, the prosecutor offered to allow respondent to plead guilty to the original charges. In the words of defense counsel (App. E, *infra*, 11a-12a):

> [O]n September 19, I had a telephone conversation with Mr. Phillips. At that time, he stated that the Government would be superseding the misdemeanor Information with a felony Indictment. Mr. Phillips stated that the decision of the Government to supersede with a felony Indictment was unrelated to my client's decision to proceed to trial; however, he stated that upon my informing him that the case would definitely be going to trial, he carefully reviewed the statutes involved, and the facts of the case, and determined that a felony Indictment would be appropriate. He further offered to permit my client to plead guilty to a misdemeanor Information, and stated that this offer would remain open until September 27, 1980.

The prosecutor subsequently repeated the plea offer in a memorandum to defense counsel on September 19 (App. F, *infra*, 28a):

> As I informed you today, the Government is proceeding with a superseding felony indictment

> in the above matter. This is based on the fact that the current information is both factually and legally incorrect on its face, as well as the fact that, in my opinion, the circumstances in this case clearly warrant a felony prosecution. As I also informed you, the Government remains willing to accept a plea of guilty to a misdemeanor information. This offer will remain open until Friday, September 27, 1980. Please call me should you have any questions regarding the above.[3]

Defense counsel responded to this written plea offer by memorandum dated September 23, 1980, in which an extension of the offer was sought (App. F, *infra*, 29a). The prosecutor replied on September 26, 1980 (*ibid.*) as follows:

> No objection to a week extension. The offer remains open until Friday, October 3, 1980. * * * Please call me at 688-2475 should you have any questions.

2. Respondent rejected the prosecutor's plea offer and moved to dismiss the superseding indictment on grounds of "vindictive prosecution," contending that the superseding indictment penalized his decision to stand trial (App. E, *infra*, 9a). The prosecutor and defense counsel stipulated that the dismissal motion should be decided on the basis of agreed upon facts, written declarations from the prosecution and the defense, and oral argument (Oct. 31, 1981 Tr. 4, 21). The district court concluded that there was no "necessity of taking any evidence in the case. * * * I think the factual matters that are here are not in

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[3] On the same day that this memorandum was sent to defense counsel, the case was presented to the grand jury and a superseding indictment was returned (App. F, *infra*, 18a).

dispute" (*id.* at 28). The district court then granted respondent's motion to dismiss the superseding indictment without rendering any findings of fact or conclusions of law (App. D, *infra*, 7a).[4]

3. The court of appeals affirmed the district court's order dismissing the felony indictment (App. A, *infra*, 1a-4a). The court rejected the government's contention that the increase in charges was justified by this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), which approved enhancement of charges to induce guilty pleas. The court of appeals recognized that the prosecutor in this case engaged in plea negotiations in which an offer was made to drop the felony charge if respondent pleaded guilty to a misdemeanor.[5] Despite the

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[4] During oral argument prior to its ruling from the bench, the district court summarized what it believed to be the applicable legal principles. The court stated that "any time a prosecutor * * * elects to proceed on a charge of less severity than the then available evidence suggests, he does so at peril if he seeks to increase the severity of the charge some time after the defendant has appeared in the action [and pleaded not guilty] * * *" (Oct. 31, 1981 Tr. 15). The court added (*id.* at 15-16) that "if a reasonable view of what was done by the prosecutor is that he acted by vindictive motivations * * * or in fact did increase the charge for reasons of vindictiveness, * * * the minute the prosecutor puts himself in the position of having increased the severity he thereby places upon himself a substantially greater burden than otherwise would exist to establish as a fact non-vindictiveness * * *."

[5] See App. A, *infra*, 2a: "* * * appellee's counsel was notified that the United States intended to seek an indictment of appellee charging him with a felony under the same statute upon which the information had been predicated. Indictment would increase appellee's maximum possible sentence from one year to ten years. Appellee was given one week, however, in which to plead guilty to the misdemeanor charge in exchange for which the United States would abandon its intent to indict him. When appellee refused to so plead he was indicted * * *."

fact that respondent was given the opportunity to accept or reject the plea offer, the court of appeals concluded that the plea bargaining occurred too late in time to bring the present case within the rule of *Bordenkircher*. Thus, notwithstanding the many factual "congruencies" between this case and *Bordenkircher*, the Court distinguished *Bordenkircher* as follows (App. A, *infra*, 3a-4a):

> In the instant case there were no plea negotiations prior to [respondent's] interposition of his not guilty plea, nor during many months thereafter. Thus [respondent] cannot be said to have been "fully informed of the true terms of the offer when he made his decision to plead not guilty," *id.*, nor at the outset of any plea negotiations following reasonably thereafter. [ ] In fact, no offer was made—rather the prosecutor presented a *fait accompli* after [respondent] elected to proceed to trial.

Instead of relying on this Court's decision in *Bordenkircher*, the court of appeals relied upon its own prior decision in *United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977). In *Alvarado-Sandoval*, the court of appeals held that an increase in charges, following defense counsel's discussion in court of "possible * * * motions" to suppress evidence, gave rise to a due process violation. The court ruled that the "[a]ppearance of vindictiveness, not vindictiveness in fact, is the touchstone * * *" (557 F.2d at 645).

REASONS FOR GRANTING THE PETITION

This case, like *United States* v. *Goodwin*, cert. granted, No. 80-2195 (Nov. 30, 1981), presents important questions concerning the extent to which the Due Process Clause requires the dismissal of super-

seding charges because of alleged "prosecutorial vindictiveness" at the pretrial stage of a criminal prosecution. If this Court reverses the decision of the court of appeals in *Goodwin*, the decision of the court of appeals in the present case should be reversed and the case remanded for further consideration in light of this Court's decision.[6]

There is an additional and independent reason for granting the petition in this case. Regardless of the outcome in *Goodwin*, the decision of the court of appeals in the present case should be reversed because it cannot be reconciled with *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). *Bordenkircher* establishes that the Due Process Clause is not violated when the prosecutor openly presents the accused with the choice of pleading guilty to the charges initially preferred against him, or standing trial on enhanced charges. Since the plea negotiations that occurred in this case did no more than present respondent with that choice, the decision of the court of appeals plainly is in error.

1. *a.* Both the district court and the court of appeals believed that it was proper to infer "vindictive" motivation in violation of the Due Process Clause because the prosecutor obtained an increased charge after respondent stated his intention to stand trial (App. A, *infra*, 2a-4a). The court of appeals concluded that the plea bargaining that took place in this case was not sufficient to justify the increased charge, and it rejected without discussion the prosecutor's explanation that the increased charge was obtained in good faith to correct errors in the initial charge and to take account of respondent's long

[6] We are forwarding to counsel for respondent copies of the government's opening and reply briefs in *Goodwin*.

record of criminal misconduct. However, as we have argued in our opening brief (Br. 19-39) and in our reply brief (R. Br. 2-13) in *Goodwin*, there is no basis in this Court's decisions to indulge in a presumption of vindictiveness and an accompanying prophylactic rule restricting acceptable justifications for prosecutorial action when enhanced charges are obtained before trial. Both cases in which this Court has found impermissible vindictiveness, *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), involved situations in which the defendant was exposed to more severe punishment after he had had his initial conviction set aside, and, accordingly, the Court carefully described its holdings in terms of due process requirements at the post-conviction stage. By contrast, in the only two cases in which defendants have argued that their pretrial decisions to stand trial were penalized by the government, the Court refused to infer prosecutorial vindictiveness. See *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, *supra*. This Court has explained that difference in result as follows: "The due process violation in * * * *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right * * *, but rather in the danger that the State might be retaliating against the accused for *lawfully attacking his conviction*." *Bordenkircher*, *supra*, 434 U.S. at 363 (emphasis added).

Finally, as we have pointed out in our reply brief in *Goodwin* (R. Br. 4-5), a conflict has arisen in the circuits on the question whether a presumption of vindictiveness exists before trial. The Fourth Circuit in *Goodwin* and the Ninth Circuit in this case have applied such a presumption and have required dismissal of superseding indictments when charges were

increased after the defendants asserted a pretrial procedural right. By contrast, in *United States* v. *Ruppel*, 666 F.2d 261, 266-267 (1982), the Fifth Circuit rejected any presumption of vindictiveness in the pretrial context:

> Ruppel contends that his decision to plead not guilty and stand trial on the counts contained in the initial indictment was the exercise of a procedural right—the right to a trial by jury—and that his due process rights were violated when the Government indicted him for additional crimes arising out of the same transactions upon which the first indictment was based. We disagree with the appellant's reading of *Pearce* and *Blackledge*.
>
> The exercise of "some procedural right" by a defendant during his prosecution—such as electing to stand trial before a jury—is by itself insufficient to place on the prosecutor the burden of demonstrating the absence of vindictiveness in his subsequent acts.

The Fifth Circuit explained that due process violations do not arise from action that discourages the exercise of "some procedural right," but from retaliation against the accused for "lawfully attacking his conviction" (*ibid.*). See also *id.* at 267 n.3.

Because the important question whether the Due Process Clause requires a pretrial presumption of vindictiveness is currently before the Court in *Goodwin*, it is appropriate at a minimum for the Court to consider the present case in light of its ultimate disposition in *Goodwin*.

b. As we also have contended in *Goodwin* (Br. 43-48; R. Br. 16-19), even if a presumption of vindictiveness were applicable in the pretrial context, such a presumption should be subject to rebuttal if

adequate non-vindictive reasons "affirmatively appear." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726; *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n.7 (1974). Thus, "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained." *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977); accord, *Miracle* v. *Estelle*, 592 F.2d 1269, 1277 & n.14 (5th Cir. 1979).

As the record below demonstrates, the government presented evidence, which was not contradicted by respondent, that effectively dispelled any suggestion of retaliation or vindictiveness. In his written declaration, the successor prosecutor averred that "[t]he superseding indictment was prepared in good faith and not for purposes of harassement or vindictiveness" (App. F, *infra*, 19a). The successor prosecutor informed defense counsel (see App. E, *infra*, 11a-12a; App. F, *infra*, 28a) that the felony charge was to be substituted because of a mistake in filing the original charge as a misdemeanor and because of a reevaluation of respondent's criminal background. The mistake in the original information was an objective matter, which appeared on the face of the pleading.[7]

Although neither the district court nor the Ninth Circuit accepted the prosecutor's explanation, the explanation offered for the instant felony charge parallels the explanation presented by the prosecutor in *Goodwin*. There, as here, the increased charge was brought by a successor prosecutor while preparing a misdemeanor case for trial. In each case, the

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[7] As previously noted (see pages 3-4 & note 2, *supra*), respondent's sale of a stolen treasury check with a face value of more than $300 was a felony, not a misdemeanor, under the governing statute.

prosecutor decided that the superseding felony charge was warranted based upon a reevaluation of the gravity of the defendant's conduct and the extent of his criminal record. As we have pointed out in our briefs in *Goodwin*, such non-vindictive explanations would have been accepted by most courts of appeals. Thus, the Fifth Circuit has held that "explanations which would negate vindictiveness could include mistake or oversight in the initial action, a different approach to prosecutorial duty by the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed. The list is intended to be illustrative rather than exhaustive." *Hardwick* v. *Doolittle*, *supra*, 558 F.2d at 301. Accord, *United States* v. *Chagra*, 669 F.2d 241, 248-249 (5th Cir. 1982); *Jackson* v. *Walker*, 585 F.2d 139, 148-149 n.20 (5th Cir. 1978); *Miracle* v. *Estelle*, *supra*, 592 F.2d at 1276-1277 & n.14. The Second Circuit also recognizes that a different approach by a successor prosecutor is sufficient to rebut a charge of vindictiveness. See *United States* v. *Ricard*, 563 F.2d 45, 48 (1977) ("Another attorney had originally handled the case and filed the information charging the misdemeanor. The case was later assigned to [a successor prosecutor], and when she reviewed the file several weeks before the trial date, she realized that the facts warranted adding a felony charge"). Similarly, the Sixth Circuit recently has held that increased charges may be justified simply because the prosecutor who obtained the original charges "was inexperienced" and failed to recognize the appropriateness of additional charges. *United States* v. *Andrews*, 633 F.2d 449, 456 (1980) (en banc). Accordingly, if this Court accepts these principles and deems sufficient the ex-

planation in *Goodwin*, the decision of the court of appeals in the present case, which utterly ignored the prosecutor's explanation, would similarly be erroneous.

2. Even if this Court were to affirm the decision of the court of appeals in *Goodwin*, the petition in the present case should nonetheless be granted and the decision of the court of appeals summarily reversed. Contrary to the reasoning of the court of appeals, there is no substantial distinction between this case and *Bordenkircher* v. *Hayes*, *supra*. Under the doctrine set forth in *Bordenkircher*, the superseding indictment in this case is conclusively free of any element of impermissible vindictiveness.[8]

In *Bordenkircher*, the prosecutor offered to recommend a prison term below the statutory maximum if the defendant agreed to plead guilty to uttering a forged instrument; however, if the defendant insisted on his right to stand trial, the prosecutor stated that he would seek a superseding indictment under the state's habitual criminal act, which carried a mandatory life sentence upon conviction. Despite this threat, the defendant pleaded not guilty, was reindicted, tried, and convicted as a habitual offender,

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[8] *Goodwin* is unlike either *Bordenkircher* or the instant case in the respect that the prosecutor never offered the defendant the option to plead guilty in lieu of being subjected to more serious charges. Rather, the increased charges were proffered entirely without regard to the defendant's request for a jury trial and plainly would not have been withdrawn even had the defendant agreed to recede from his request and accept a trial by the magistrate. While in our view this aspect of *Goodwin* hardly justifies a finding of a due process violation, it does provide a distinction from *Bordenkircher* (on which Goodwin strongly relies, see 80-2195 Resp. Br. 26-31) that is entirely absent here.

and was sentenced to life imprisonment. In rejecting the claim that the threats and increased charges violated due process, the Court held that during the "give-and-take" of the plea bargaining process, the prosecutor has a legitimate interest in persuading a defendant "to forego his right to plead not guilty" (434 U.S. at 363, 364). Accordingly, the Court found "no * * * element of punishment or retaliation" when the accused has been "fully informed of the true terms of the offer" and "is free to accept or reject [it]." *Id.* at 360, 363. The Court summarized its ruling as follows (*id.* at 365):

> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Here, after stating his intent to stand trial on the misdemeanor charge, respondent was presented with the same sort of "unpleasant alternatives" that were presented to the defendant in *Bordenkircher*. There is no doubt that respondent was fully aware of the alternatives that he faced and that he had a two-week period to consult with counsel before making a final decision. As in *Bordenkircher*, respondent "was fully informed of the true terms of the offer" and was totally "free to accept or reject" it (434 U.S. at 360, 363). After the felony charge was filed, the prosecutor confirmed that there was a continuing understanding that respondent could plead guilty to the original misdemeanor information in return for a dismissal of the felony indictment. Accordingly, this case would be no different if the grand jury had

indicted respondent at the outset, and the prosecutor had offered to drop the felony charge in favor of a misdemeanor charge as part of the plea bargain. See *Bordenkircher*, *supra*, 434 U.S. at 360-361.

In the final analysis, the court of appeals refused to apply *Bordenkircher* because of an immaterial chronological difference in the plea negotiation process.[9] However, "the chronology of events in which the prosecutor enhanced [the charges against the defendant] is not decisive." *Ehl* v. *Estelle*, 656 F.2d 166, 171 (5th Cir. 1981). Rather, the rationale of *Bordenkircher* is fully applicable to any pretrial situation in which a criminal defendant is free to

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[9] Although the court acknowledged the undisputed evidence of the prosecutor's plea offer (App. A, *infra*, 2a), it remarked that "plea bargaining played no part in the matter" (*id.* at 4a). The court was of the view that the plea negotiations in this case came too late because they were contemporaneous with the prosecutor's decision to obtain a superseding indictment. There is, however, no substantial difference between a case in which plea negotiations take place before, as opposed to concurrently with, the prosecutor's procurement of enhanced charges. So long as the alternative choices are offered to the accused, and a meaningful opportunity for negotiation is extended, there is no basis for a legal distinction. The legitimate objectives of plea bargaining for both the prosecution and the defense—conservation of resources and avoidance of the uncertainties of trial—are achieved by plea negotiations at any time prior to trial.

The court of appeals' suggestion (App. A, *infra*, 3a-4a) that the plea negotiations in this case came too late because they occurred after respondent decided to plead not guilty at arraignment also is without merit. Indigent defendants such as respondent do not have counsel prior to arraignment. Thus, plea bargaining could not occur before arraignment in a case of this kind. Moreover, the valid premise of all plea bargaining is that the defendant's initial decision to plead not guilty can be altered through negotiation.

accept or reject an inducement to terminate the proceedings against him by the entry of a guilty plea. "[T]he key to disarming an allegation of vindictiveness is the knowledge and awareness by the accused of the terms of the plea bargain and the price of rejecting the bargain * * *." *Ibid.*[10] Since the record below unambiguously shows that these essential requirements of *Bordenkircher* were satisfied, the decision of the Ninth Circuit should be summarily reversed even if this Court affirms the Fourth Circuit's decision in *Goodwin*.[11]

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[10] The court of appeals incorrectly stated (App. A, *infra*, 4a) that the indictment of respondent with a felony charge was presented as a "*fait accompli*." In fact, the prosecutor's decision to press a felony charge against respondent became a "*fait accompli*" only after respondent rejected the government's offer.

[11] To the extent that the holding of the court of appeals rests on the hypothesis that *Bordenkircher* has no application whenever the plea bargaining occurs after the defendant has entered an initial plea of not guilty (see Pet. App. 3a-4a), such a result would render *Bordenkircher* inapplicable to most plea bargaining situations. In the federal system, at least, arraignment follows swiftly after the filing of an indictment or information and is usually, as here, accompanied by the pro forma entry of a plea of not guilty. While plea bargaining occasionally occurs prior to the making of any formal charge, it more often is undertaken after proceedings have been instituted and the defendant has initially pleaded not guilty. The Court's clearly expressed concern in *Bordenkircher* to avoid impediments to the plea bargaining process can hardly have been meant to be limited to those few instances in which bargaining fortuitously commences prior to arraignment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 80-1835

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES EDWARD CURRIE, DEFENDANT-APPELLEE

Argued and Submitted May 7, 1981

Decided Aug. 17, 1981

As Modified Feb. 5, 1982

Rehearing and Rehearing En Banc
Denied Feb. 10, 1982

Before NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge.

PER CURIAM.

The United States, by information, charged the appellee with conversion of a stolen United States Treasury check having a value not in excess of $100.00. 18 U.S.C. § 641. Appellee was arraigned and the matter was set for trial before a United States Magistrate. Approximately one month before the date set for trial, an Assistant United States Attorney was assigned to prosecute the matter and

* Honorable Philip C. Wilkins, Chief, United States District Judge for the Eastern District of California, sitting by designation.

discovery procedures began, but no plea bargaining took place. A week or so later, appellee's attorney notified the Assistant United States Attorney that his client intended to go to trial. Shortly thereafter the appellee's counsel was notified that the United States intended to seek an indictment of appellee charging him with a felony under the same statute upon which the information had been predicated. Indictment would increase appellee's maximum possible sentence from one year to ten years. Appellee was given one week, however, in which to plead guilty to the misdemeanor charge in exchange for which the United States would abandon its intent to indict him. When appellee refused to so plead he was indicted, but at a pretrial hearing the trial judge dismissed the indictment as the product of vindictive prosecution. A superseding information has since been entered against appellee.[1] The United States appeals from the dismissal of the indictment.

In appealing the dismissal of the indictment the United States relies upon the recent United States Supreme Court case *Bordenkircher* v. *Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), arguing that this case stands for the "use of threatened reindictment as a bargaining chip in plea negotiations." Appellant's Opening Brief at 10. In support of its argument appellant points out the following factual congruencies between *Bordenkircher* and this case: (1) the prosecutors in both cases knew all the facts

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[1] We note that the district court did not dismiss the indictment with prejudice or otherwise indicate that the dismissal should have that effect. Nor do we view the record in this case as requiring that remedy. Thus, our decision affirming the dismissal of the indictment does not prevent the prosecution from going forward pursuant to the superseding information, which restates the original misdemeanor charge.

relied upon in seeking the indictment at the time the original, lesser charge was brought; (2) the same conduct was involved in both the lesser and the greater charges, and (3) the challenged indictment in both cases increased the defendants' sentence exposure.

Although we agree that these congruencies exist, there are also several distinguishing characteristics between *Bordenkircher* and this case.

First, the *Bordenkircher* Court noted that:

> [w]hile the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty.

434 U.S. at 360, 98 S.Ct. at 666. In the instant case there were no plea negotiations prior to appellee's interposition of his not guilty plea, nor during many months thereafter. Thus, appellee cannot be said to have been "fully informed of the true terms of the offer when he made his decision to plead not guilty," *id.* nor at the outset of any plea negotiations following reasonably thereafter.[2] In fact, no offer was

---

[2] We recognize that plea negotiations in some districts may routinely be initiated after arraignment because the defendant may be without counsel prior to that time. In the present case, however, the government's "raising of the ante" was not a mere invitation of plea bargaining after an arraignment and plea that, pursuant to local custom or practice, was understood to be an invitation to such bargaining. Rather, it was a response, without prior bargaining overtures, to the announcement of defendant's counsel that he was going to trial, made at a time when that decision was anything but preliminary.

made—rather the prosecutor presented a *fait accompli* after defendant elected to proceed to trial. Second, the Court also stressed that the *Bordenkircher* facts did not present "a situation . . . where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." *Id.* There is no indication in the record that this appellee had any notice at all of the prosecutor's intent until *after* he had decided to stand trial on the misdemeanor charge and had communicated that intent to the prosecutor through his attorney. Finally, it was necessary for the United States to prove additional facts to support Hayes' conviction under the superseding indictment for habitual criminality than would have been necessary to convict him of the original charge of uttering. Conversely, the elements of proof as to the charges against appellee in this case would be identical whether he is charged with a misdemeanor or a felony violation of 18 U.S.C. § 641, the only distinction between the two charges being the value of the allegedly converted Treasury check.

In light of the foregoing discrepancies between the facts of *Bordenkircher* and those underlying this case, it is unnecessary to address appellant's theory any further, as plea bargaining played no part in the matter. The facts of this case bring it within the reasoning and holding of *United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) and the trial court correctly so found. The decision is, therefore,

AFFIRMED.

APPENDIX B

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court. If the decision is by opinion, judgment was entered as of the decision date printed on the slip opinion. [*August 17, 1981*].

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1835

CR 80-384-1-RJK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES EDWARD CURRIE, DEFENDANT-APPELLEE

Filed Feb. 10, 1982

Appeal from the United States District Court
for the Central District of California

Honorable Robert J. Kelleher, Judge Presiding

Before: NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b)

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-384(A)-RJK

UNITED STATES OF AMERICA

vs.

JAMES EDWARD CURRIE

[ORAL RULING OF THE DISTRICT COURT]

THE COURT: * * *

Well, it seems that there has emerged here something which is certainly somewhat of an anomaly. From all the colloquy that has occurred it seems we do have a very strange situation in which a United States attorney, if the government's view is correct, could say, "We're going to indict in all instances, forget these informations, we can always take a plea to a lesser charge," or, "We're going to file informations and in all instances put a written notice right on the information saying, 'You're just lucky, fella, we're starting off on a lesser charge against you but you are on notice that you either plead guilty to this or we're going to up the ante'."

If it emerges from this motion that that is deemed to be the law, I think the Circuit has some work cut out for itself and it better consider any such proposition.

All right. Anything further?

MR. KENDALL: No, Your Honor.

THE COURT: The motion [to dismiss the superseding indictment] is granted.

We stand adjourned.

(Proceedings concluded.)

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-384-RJK

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES EDWARD CURRIE, DEFENDANT

November 4, 1980

NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENT DUE TO VINDICTIVE PROSECUTION; DECLARATION OF VICTOR B. KENTON; MEMORANDUM OF POINTS AND AUTHORITIES

TO: THE UNITED STATES ATTORNEY ANDREA SHERIDAN ORDIN AND TO ASSISTANT UNITED STATES ATTORNEY LAYN R. PHILLIPS:

PLEASE TAKE NOTICE that on November 4, 1980, at 9:30 a.m., or at such other time as the Court may order, defendant JAMES E. CURRIE will move the Court for an Order dismissing the Indictment in this action, on the basis that defendant's due process rights under the Fifth Amendment have been violated by a vindictive prosecution.

This Motion is based on the attached Declaration of Victor B. Kenton, Memorandum of Points and

Authorities, and on such other and further evidence as may be presented at the hearing in this matter.

Respectfully submitted,

JAMES R. DUNN
Federal Public Defender

By /s/ Victor B. Kenton
VICTOR B. KENTON
Deputy Federal Public Defender
Attorneys for Defendant
JAMES E. CURRIE

Dated: October 16, 1980

DECLARATION OF VICTOR B. KENTON

I, VICTOR B. KENTON, hereby declare and state as follows:

1. I have personal knowledge of the following facts, and if sworn as a witness, could competently testify thereto. I am the attorney of record for the defendant, JAMES E. CURRIE, in this action.

2. On April 23, 1980, the United States Attorney for the Central District of California filed a misdemeanor Information against James E. Currie, charging a violation of 18 United States Code 641, illegal sale of government property, having a value of less than $100.00. Mr. Currie did not appear at his Arraignment before the Magistrate on April 28, 1980, since he was at that time, unknown to the Government, incarcerated at Los Angeles County Jail. When the Government discovered this, he was brought in for Arraignment on the misdemeanor Information on August 25, 1980. On that date I was appointed as counsel for Mr. Currie, who elected to proceed before the Magistrate. The Court of Magistrate Tassopulos was drawn, and the case was set for jury trial on October 7, 1980, at 9:00 a.m. Motions were due to be filed by September 23, 1980, with the Government response by September 30th, and Motions to be heard on the date of trial.

3. Assistant United States Attorney Layn Phillips was assigned to prosecute this case for the Government. Since he was new to the office, and did not arrive until September 7, 1980, it was not until shortly after that date that I had my first discussion with the Government about this case. I requested the Government to provide me with discovery, and I received certain documents on September 11th. Between September 11th and September 19th, I had additional discussions with Mr. Phillips regarding the

discovery provided, and my requests for additional discovery. None of those discussions in any manner involved any form of plea bargaining or plea negotiation. To the best of my recollection, Mr. Phillips did inquire of me whether the case would definitely go to trial. I responded that I would review the discovery material with my client to determine whether there was any possibility that he did not wish to proceed with trial.

4. On or about September 17, 1980, I informed Mr. Phillips that the case would be proceeding to trial. On that same day, I sent a written memorandum to the Court Clerk, Ralph Klein, stating that I needed additional time to file motions, in view of my own heavy trial schedule during that week. At that time, I made additional discovery requests of Mr. Phillips.

5. The next day, September 18, 1980, I received a written memorandum from Mr. Phillips responding to my additional discovery requests to provide additional information. That memorandum also indicated the Government's position in regard to impeachment of Mr. Currie under Federal Rule of Evidence (609), and other matters. A true and correct copy of that memorandum is attached to this Declaration as Exhibit A.

6. On September 19, 1980, I sent a written request to Mr. Phillips for further Discovery. A true and correct copy of that written request is attached hereto as Exhibit B.

7. After sending this memorandum on September 19th, I had a telephone conversation with Mr. Phillips. At that time, he stated that the Government would be superseding the misdemeanor Information with a felony indictment. Mr. Phillips stated that the decision by the Government to supersede with a felony indictment was unrelated to my client's decision to

proceed to trial; however, he stated that upon my informing him that the case would definitely be going to trial, he carefully reviewed the statutes involved, and the facts of the case, and determined that a felony Indictment would be appropriate. He further offered to permit my client to plead guilty to a misdemeanor Information, and stated that this offer would remain open until September 27, 1980. Mr. Phillips sent me a memorandum summarizing this conversation, a true and correct copy which is attached hereto as Exhibit C.

8. Prior to September 19, 1980, as noted from the facts set forth in this Declaration, Assistant United States Attorney Phillips and I had discussed this case on numerous occasions, on issues ranging from discovery requests to the position of the Government regarding impeachment for prior felony or other convictions. Further, the felony Indictment is based on the exact same set of facts as the misdemeanor Information. No further facts or information came to the Government's attention from the time the misdemeanor Information was filed, April 23, 1980, until the date the Government decided unilaterally to supersede with a felony Indictment, on September 19, 1980. Only one day after I informed the Government that there was no possibility of Mr. Currie entering a plea of guilty, the Government superseded with its felony Indictment.

I declare under penalty of perjury that the foregoing is true and correct and was executed this 15th day of October, 1980, at Los Angeles, California.

/s/ Victor B. Kenton
VICTOR B. KENTON
Deputy Federal Public Defender

[EXHIBITS OMITTED]

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-384-RJK

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES EDWARD CURRIE, DEFENDANT

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF LAYN R. PHILLIPS

Plaintiff, United States of America, hereby responds to defendant's motion to dismiss the Indictment. This response is based on the files and records of this case, the attached memorandum of points and authorities, and the Declaration of Layn R. Phillips and such evidence and argument as may be presented at the hearing on defendant's motion.

Respectfully submitted,

ANDREA SHERIDAN ORDIN
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ Richard B. Kendall
RICHARD B. KENDALL
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

DECLARATION OF LAYN R. PHILLIPS

I, LAYN R. PHILLIPS, declare as follows:

1. I am an Assistant United States Attorney for the Central District of California. I have been employed in that capacity since September 8, 1980. Following my arrival at the United States Attorney's Office on September 8, 1980, I was assigned to represent the United States in several criminal prosecutions, including CR 80-384, *United States* v. *James Edward Currie*. As of that date, the case involved a misdemeanor information filed April 23, 1980, charging an Illegal Sale of Government Property having a value less than $100, in violation of Title 18, United States Code, Section 641.

2. Pursuant to instructions by my supervisor, Assistant United States Attorney Deanne H. Smith, I began to contact the various attorneys who were representing defendants in the cases to which I was assigned. My first contact with defense counsel in *United States* v. *James Edward Currie* was on Tuesday, September 9, 1980, in a telephone conversation with Victor Kenton, Deputy Federal Public Defender in Los Angeles. (Exhibit A) During that conversation, Mr. Kenton requested various discovery materials, and by letter of September 11, 1980, Mr. Kenton was provided with a complete copy of the prosecutor's file in the matter. (Exhibit A) Pursuant to Court Order, defendant was to notice any change of plea by October 3, 1980.

3. As of September 16, 1980, I had not an opportunity to review the case with either the Secret Service case agent or the Secret Service agent who was directly involved in the sale of the government treasury check with the defendant. On that day, I

personally visited the United States Secret Service offices in Los Angeles to review the file of case agent James A. Corry. (Exhibit B) Following this review, I forwarded additional discovery materials to defense counsel Kenton. (Exhibit B).

4. On September 18, 1980 I responded to additional discovery requests made by defense counsel. (Exhibit C) On either September 17 or September 18, 1980, in a telephone conversation with Victor Kenton, he informed me that the *Currie* case would likely proceed to trial by jury on October 7, 1980. Because this was the only case of the several matters which I was handling which was likely to be tried, and because this would have been my first criminal jury trial in federal district court, I began to devote a substantial amount of time to preparation for trial.

5. In preparing for trial, I recognized two defects in the information filed by the United States Attorney's Office. Following an analysis of the relevant case law, I first noticed that while criminal intent was clearly an essential element of the crime of illegal sale of government property, the information in this case failed to allege that the defendant had committed the act knowingly, unlawfully and willfully. (Exhibit D) Through further legal research I found a case which had reversed a conviction for failure to include an allegation of criminal intent in an 18 U.S.C. § 641 indictment. *See United States* v. *Denmon*, 483 F.2d 1093 (1973).

Second, I noticed that the facts which would be proved at trial were at odds with the language of the information. While the information alleged that the value of the illegally sold check was "less than one hundred dollars ($100)," the evidence at trial would show that the check had a face value of $317.60

and was actually sold to the Secret Service Special Agent for $100.00. (Exhibit D) The relevant statute, Title 18, United States Code, Section 641, provides that "value means face par or market value or cost price, either wholesale or retail, *whichever is greater.*" (Emphasis is added.) In short, the evidence at trial would not show, by any method of valuation that the check had a value of less than $100.00 as alleged in the information.

6. I further noted from an examination of the FBI Rap Sheet that the defendant in this case has an extensive criminal record including felony convictions for burglary, armed robbery, and an assortment of misdemeanors covering a long period of years. (Exhibit E)

Additionally, a review of the case file and a discussion with Secret Service agents revealed that at the time of the sale of the treasury check in this case, the defendant participated in a discussion relating to plans to steal and sell numerous other treasury checks from the United States Post Office in Pasadena, California. Considering the factual and legal errors on the face of the information, the defendant's culpability in connection with the offense, and the defendant's history with respect to criminal activity, I was of the opinion that the case had been incorrectly filed as a misdemeanor, and instead warranted felony prosecution.

7. Following my review of the relevant case law and the files of the case, I contacted Assistant United States Attorney Rick Flam, the attorney who filed the misdemeanor information. After discussing the above-described factors with Mr. Flam, he concurred in my judgment that the case warranted a felony prosecution and had been incorrectly filed as a misdemeanor.

8. I next contacted Assistant United States Attorney William J. Sayers, Chief of the United States Attorney's Criminal Complaints Division. After presenting the above-described information to Mr. Sayers, he concurred in my judgment that the case warranted a felony prosecution and had been incorrectly filed as a misdemeanor.

9. Next, I contacted Assistant United States Attorney Robert L. Brosio, Chief of the Criminal Division. Mr. Brosio concurred in my judgment that the case warranted a felony prosecution and had been incorrectly filed as a misdemeanor. Further, he authorized a superseding felony indictment to be prepared. Because the case had been improperly filed as a misdemeanor, however, he further instructed me to inform defense counsel that the Government remained willing to accept a plea of guilty to the misdemeanor information.

10. On September 19, 1980, I informed defense counsel of the Government's intent to proceed with a superseding indictment, stating that:

> "This is based on the fact that the current information is both factually and legally incorrect on its face, as well as the fact that, in my opinion, the circumstances in this case clearly warrant a felony prosecution." (Exhibit F)

Mr. Kenton was further informed that the Government remained willing to accept a plea of guilty to the misdemeanor information. (Exhibit F) The offer remained open until Friday, October 3, 1980. (Exhibit G)

11. On September 19, 1980, the case was presented to a federal grand jury, which issued the superseding indictment. The indictment which was issued was different in two respects from the previous in-

formation. First, unlike the information, the indictment included the essential element of criminal intent in its charge. (Exhibit H) Second, unlike the misdemeanor information, the indictment correctly stated the check's value as being in excess of $100.00. (Exhibit H)

12. The superseding indictment was prepared in good faith and not for purposes of harassment or vindictiveness.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: This 18th day of October, 1980.

/s/ Layn R. Phillips
LAYN R. PHILLIPS

[EXHIBITS A THROUGH C OMITTED]

EXHIBIT D

Filed Apr. 23, 1980

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR. 80-384

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES EDWARD CURRIE, DEFENDANT

INFORMATION

(18 U.S.C. § 641: Illegal Sale of
Government Property)

The United States Attorney charges:

(18 U.S.C. § 641)

On or about March 5, 1979, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD CURRIE, without authority, sold, conveyed and disposed of property of the United States, namely, a United States Check, number 15,016,742 payable to Robert L. Rowley, having a value less than one hundred dollars ($100).

ANDREA SHERIDAN ORDIN
United States Attorney

EXHIBIT E

STATE OF CALIFORNIA

[SEAL]

BUREAU OF IDENTIFICATION
DEPARTMENT OF JUSTICE
3301 C Street

August 27, 1979
U.S. Secret Service
300 N. Los Angeles St., Rm. #4324
Los Angeles, CA 90012

Attention: Jim A. CORRY

Address replies to:
Command Center
Ivalou Woodridge
Phone: (916) 445-9240
CII #: 829 139
Your: 8-23-79
Subject: James E. CURRIE

XXXXX Subject(s) has/have been identified with a previous record in our files; record transcript(s) enclosed.

——— No record found on the basis of information furnished with your inquiry.

——— Subject(s) may be the same as described in the enclosed record transcript(s).

——— Photograph(s) enclosed.

——— Copy of fingerprint card(s) enclosed.

——— Other:

Sincerely,

/s/ R. E. Scott
ROBERT E. SCOTT
Program Manager
Special Services

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
BUREAU OF IDENTIFICATION
P.O. Box 13417, Sacramento

FBI #570 546 B
SN #562 02 2628

E

The following CII record, NUMBER 829 139 Is For Official Use Only

TTT 1 4 M N BLK BRO 5-9 160 TN 1-1-1938

AAA 1 4 CURRIE: JAMES EDWARD

Arrested or Received	Department and Number	Name	Charge	Disposition
Alias: James Melvin Edward Currie; John Edward Thomas; Raymond Johnson; James Edward Curry; Jessie Eugene Otis; James Johnson; James Edward Currie; Robert James Jackson; Henry Jackson; James Garrett;				
[1954]	PD Arcadia JB-9770	James Currie	459 PC Burg	Rel to PD Monrovia
[1954]	PD Monrovia 8455	James Edward Currie	459 PC Burg	Rel After Inv
[1955]	Calif Youth Auth 22138	James Edward Currie	Burg	From: Los Angeles Co Juv Crt 11-10-55, Paroled
[1955]	PD Monrovia 15000	James Edward Currie	Petty Theft	Rel After Inv

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[1955]	PD Monrovia 8455	James Edward Currie	488 PC PT	Rel to Juv Crt
[1956]	CYA Norwalk 22138	James Edward Currie	Ret PV	6-25-56, Escaped
[1956]	PD Santa Maria 18656	James Edward Currie	1) 503 VC Auto Theft 2) Escape	Rel to CYA Auth
[1956]	CYA Norwalk 22138	James Edward Currie	Ret Escapee	11-7-56, Paroled Sept. 1959, Disch
[1957]	PD Los Angeles 397075-C/402662	James Edward Currie	211 PC Robb Fel	8-30-57, #193068, Found Not Guilty of Att Robb
[1957]	So Los Angeles B-494525	James Edward Currie	Att Robb (Arr By PD Los Angeles)	
[1957]	PD Los Angeles 397075-C	James Melvin Edward Currie	459 PC Burg Fel	12-18-57, Rel
[1958]	PD Los Angeles 397075-C/538279	James Melvin Edward Currie	Warr 211 PC Robb Fel 4 Cts	8-12-58, #199371, 3 Cts 211 PC, Fels Dism; Conv 1 Ct 211 PC, 1st Deg, Fel Comm State Prison Sent to Run CC W/ CS#199203

Arrested or Received	Department and Number	Name	Charge	Disposition
[1958]	PD South Gate A-29564	James Melvin Edward Currie	1) 211 PC Robb Strongarm 2) 245 PC Adw	
[1959]	Calif Dept of Corrections A-54495	James Melvin Edward Currie	CS#199371 211 PC Robb 1st Deg CS#199203 211 PC Robb 1st Deg	From: Los Angeles Co Term: 5 Yrs-Life 2 Cts CC 1-4-71, Paroled to Los Angeles Co
[1971]	PD Arcadia JB-25501	John Edward Thomas	211 PC Armed Robb	1-18-72, #A-549134 Conv 1 Ct 211 PC, 2nd Deg, Fel, Jry 3-7-72, Comm State Prison, 153 Ds Cts
[1972]	Calif Dept of Corr, RC, Chino A-54495-A	James Edward Currie	Ret PV W/AC CS#A-549134 211 PC Robb 2nd Deg W/2 PFC	From: Los Angeles Co Term: 1 Yr-Life Co Wpt 9-17-75, Paroled to Los Angeles Co
[1975]	PD Los Angeles 397075-C/3615179	James Edward Currie	11357 H&S Poss Marij Fel	3-29-76, #A-321531, JD#19100, Conv of 11357 H&S, $100 Fn + Pa, Cts

[1976]	PD Pasadena 88307	James Johnson	484 PC PT/Shplft	6-10-76, #M126515, JD#19470, Conv 484 PC, Misd, PG, -125 Fn
[1976]	PD Pasadena 39749	James Edward Currie	459 PC Burg Residential	
[1976]	PD Pasadena 39749	James Edward Currie	1)459 PC Burg Commercial 2)496 PC Rsp 3)32 PC Accessory	
[1977]	PD Arcadia JB-30866/77-670	James Edward Currie	211 PC Robb	3-18-77, #A-555885 JD#19482, 664/221 PC, Fel, Dism, Insuf Evid; Conv 236 PC, Misd PG. 180 Dsd Jl
[1977]	PD Pasadena 92490	James Edward Currie	459 PC Burg Residential	9-15-77, Rel 849B PC, Deemed not Arr Det Only, Furth In
[1977]	PD Pasadena 92490	James Edward Currie	11378 H&S Poss Contr Subs for Sale	10-28-77, Rel 849B PC, Deemed Not Arr Det Only Furth In

Arrested or Received	Department and Number	Name	Charge	Disposition
[1977]	PD Los Angeles 397075/4583462	James Edward Curry	484 PC Theft of Personal Prop Misd	11-4-77, #31582656 JD#19463, Conv 484 PC, Misd, PG, 45 DS Susp, 12 Mos Summ PROB w/o Supv, $120 Fn or 4 Ds J Cred $60 or 2 Ds, Comm
[1978]	PD Los Angeles 397075/4923128	James Garrett	4143 B&P Poss Hype Kit Misd	
[1978]	PD Los Angeles 397075/4952562	Jessie Eugene Otis	211 PC Robb Fel	9-15-78, Rel 849.5 PC, Det Only
[1978]	So Los Angeles 4990401/781461705	Jesse E. Otis	487.3 PC Gta Fel	
[1978]	PD Los Angeles 397075/5076140	James Johnson	211 PC Robb Fel	

[1979]	PD Los Angeles 397075-C/5097019	Robert James Jackson	211 PC Robb Fel 1-17-79, Rebk CS#31114673 12020 PC Misd
[1979]	PD Los Angeles 397075/5176395	Henry Jackson	459 PC Burg Fel

EXHIBIT F

September 19, 1980

LAYN R. PHILLIPS
Assistant United States Attorney
United States v. James Edward Currie
CR 80-384

VICTOR KENTON
Deputy Federal Public Defender

Dear Victor:

As I informed you today, the Government is proceeding with a superseding felony indictment in the above matter. This is based on the fact that the current information is both factually and legally incorrect on its face, as well as the fact that, in my opinion, the circumstances in this case clearly warrant a felony prosecution. As I also informed you, the Government remains willing to accept a plea of guilty to a misdemeanor information. This offer will remain open until Friday, September 27, 1980.

Please call me should you have any questions regarding the above.

Sincerely,

ANDREA SHERIDAN ORDIN
United States Attorney

LAYN R. PHILLIPS
Assistant United States Attorney
(213) 688-2475

EXHIBIT G
September 26, 1980

LAYN R. PHILLIPS
Assistant United States Attorney
United States v. James Edward Currie
Cr 80-384-VST

VICTOR KENTON
Deputy Federal Public Defender

Dear Victor:

I am in receipt of your memos of September 19, 1980 and September 23, 1980.

As to your September 19, 1980 memo:

1) No fingerprint or palm print examination;

2) Not applicable.

As to your September 23, 1980 memo:

1) No objection to a week extension. The offer remains open until Friday, October 3, 1980.

Further, it is necessary for me to clarify my memo to you of September 18, 1980 where I informed you that SA Williams was shown no photo displays of the defendant. Subsequent to the writing of that memo, SA Williams informed me on September 24, 1980, that although he was shown no photo spreads including the defendant's picture, he was shown a single photograph of the defendant by SA Corrie following the defendant's arrest. A conversation with SA James Corrie confirmed the above.

Please call me at 688-2475 should you have any questions.

Sincerely,

LAYN R. PHILLIPS
Assistant United States Attorney

EXHIBIT H

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

September 1980 Grand Jury

No. CR 80-384 (A)

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES EDWARD CURRIE, DEFENDANT.

First Superseding

INDICTMENT

(18 U.S.C. § 641: Illegal Sale of Government Property)

The Grand Jury charges:

(18 U.S.C. § 641)

On or about March 5, 1979, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD CURRIE, knowingly, willfully and without authority, sold, conveyed and disposed of property of the United States, namely, a United States Check, number 15,016,742 payable to Robert L. Rowley, having a value exceeding one hundred dollars ($100).

A TRUE BILL

ANDREA SHERIDAN ORDIN
United States Attorney

Foreperson

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 370259 847

Opposition

COPY

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1849

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES EDWARD CURRIE, RESPONDENT

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES R. DUNN
Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-2854
FTS 798-2854

ALAN ZARKY
Deputy Federal Public Defender

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1849

UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES EDWARD CURRIE, RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, JAMES EDWARD CURRIE, pursuant to Rule 46 of the Rules of the Supreme Court of the United States, and 18 U.S.C. § 3006A(d)(6), asks leave to file the attached Respondent's Brief in Opposition on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of fees and costs and to proceed in forma pauperis. Respondent was represented by appointed counsel in the United States District Court for the Central District of California on appeal to the United States Court of Appeals for the Ninth Circuit, and has not previously sought leave to proceed in forma pauperis in any court below.

Respectfully submitted,

JAMES R. DUNN
Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-6044
FTS 798-6044

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No. 81-1849

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES EDWARD CURRIE, RESPONDENT

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent JAMES CURRIE respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 667 F.2d 1251.

I

QUESTION PRESENTED

When the Government increased the severity of the charges against the petitioner immediately after petitioner asserted his right to trial, and when the trial court found that the reason for that increase was not to correct any error in the original charge, but was rather a response to petitioner's assertion of his rights, did the trial court err in ruling that that increase was vindictive and had violated defendant's due process rights?

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II.

STATEMENT OF THE CASE

On April 13, 1980, the Government filed a misdemeanor information [Petitioner's Appendix ("P.App.") F, 20a] against responent JAMES E. CURRIE. The information charged CURRIE with selling, conveying and disposing of a United States check, without authority, in violation of Title 18, United States Code, Section 641.

Prior to filing the charges, the Assistant United States Attorney in charge of the case, Fredrick Flam, had before him the evidence contained in Exhibits A through G of Appendix A (stipulation of counsel, Appendix B, 46a - 48a). These documents included all the facts on which the Government relied in attempting to justify the later increase in charges, including respondent's "rap sheet" [Appendix A, Exhibit G, 19a - 25a] and the belief of Secret Service agents that respondent had participated in a scheme to steal other Treasury checks [Appendix A, Exhibit B, 6a]. It was stipulated [R.T. 23-24][1/] [Appendix F, 57a - 58a] that after considering those documents, Mr. Flam made a conscious choice to charge CURRIE with a misdemeanor, rather than a felony. It was further stipulated that Mr. Flam was aware that CURRIE could have been charged with a felony based on the evidence known to Flam.

When the information was filed, the Government was unaware that the defendant was incarcerated in Los Angeles County Jail. When that was learned, defendant was arraigned

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1/"R.T" refers to Reporter's Transcript.

on August 25, 1980, and pleaded not guilty. The case was set for jury trial before the Honorable Venetta S. Tassopulos, United States Magistrate, to commence October 7, 1980.

On September 8, 1980, Assistant United States Attorney Layn R. Phillips was assigned to prosecute this case. On September 9, 1980, Deputy Federal Public Defender Victor B. Kenton requested discovery from Mr. Phillips. On September 11, 1980, Mr. Phillips provided Mr. Kenton with the documents comprising Exhibits A through G of Appendix A. On September 16, 1980, Mr. Phillips reviewed the files of Special Agent James Corrie, the case agent. Following that review, on September 17, 1980, Mr. Phillips sent Mr. Kenton additional discovery, consisting of the documents comprising Exhibits I through N of Appendix A. On September 17, 1980, Mr. Phillips met with two Secret Service agents regarding the case. On September 18, 1980, Mr. Phillips sent Mr. Kenton a memorandum regarding discovery and various aspects of the upcoming trial.

During the course of these exchanges, Mr. Phillips asked Mr. Kenton whether the case would definitely be going to trial. Mr. Kenton responded that he would review the discovery materials with CURRIE and determine whether there was any possibility that CURRIE did not wish to proceed with trial. On September 17, 1980, Mr. Kenton informed Mr. Phillips that the case would definitely be proceeding to trial. On September 17, 1980, Mr. Kenton sent, and Mr. Phillips received, a memorandum regarding preparation for trial. Up through this moment, none of the discussions between Mr. Kenton and Mr. Phillips in any manner involved any form of plea bargaining or plea negotiations.

[Affidavit of Victor Kenton, Appendix E, 52a - 56a]

One or two days after learning that CURRIE was insisting on his right to trial, Mr. Phillips decided to file a super- seding indictment charging CURRIE with a felony under the same statute, Title 18 United States Code, Section 641. This indictment was filed September 19, 1980. It was predicated on the exact same alleged acts supporting the initial information. Mr. Phillips then informed Mr. Kenton that, in lieu of going to trial on the felony, CURRIE could plead guilty to the misdemeanor information. This offer was to remain open until September 27, 1980.

The Government filed a response to defendant's motion to dismiss the indictment due to vindictive prosecution. This reponse admitted that Mr. Phillips reconsidered the charges against CURRIE only after Mr. Kenton announced his intentions regarding trial. [P. App., 16a]The response attributed the decision to increase charges to four factors: the omission of a scienter allegation in the information; the discrepancy between the actual and alleged value of the check ($317.60 as opposed to the statutory language of "less than one hundred dollars"); respondent's criminal record; and respondent's discussion of a scheme to steal other checks.

After respondent's motion to dismiss was granted, the Government filed a superseding information, charging defendant with a misdemeanor, this time omitting any reference to the value of the check but including a scienter allegation. Defendant moved to dismiss that information. At the hearing on that motion (which was denied) the court explained its

earlier dismissal of the indictment. The Court explicitly rejected petitioner's contention that the indictment was made to correct an error in the earlier charging. The court instead found that petitioner had increased the charges specifically as a response to respondent's decision to go to trial. [The complete text of the court's comments is set forth in Appendix C, 49a - 50a]

In a unanimous decision, the Ninth Circut Court of Appeals affirmed the dismissal. No active judge having requested a vote on petitioner's suggestion for rehearing en banc, that suggestion was rejected.

III.

SUMMARY OF ARGUMENT

A. The proper outcome of this case will not be affected by the ruling in United States v. Goodwin, cert. granted No. 80-2195 (November 30, 1981), (unless this Court holds that a vindictive prosecution motion can never apply to pre-trial proceedings). The issue in Goodwin relates to what explanations for increased charges can be deemed legally sufficient or insufficient, and what presumptions a court might apply in evaluating a claim of vindictive prosecution. In contrast, this case deals with a specific finding by the trial court that the Government's explanation for increasing charges was false, and that the Government acted only as a response to respondent's assertion of his constitutional rights.

B. The outcome in this case is not in conflict with the holding in Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Bordenkircher deals only with the situation where a defendant is fully informed, at the time he decides to go to trial, that such a decision will result in higher charges. The case specifically distinguishes the factual situation present here, the bringing of higher charges, without prior notice, after a defendant insists on going to trial.

IV.

REASONS FOR DENYING THE PETITION

The petitioner makes two arguments for granting the petition. The first argument assumes that this Court will reverse the decision of the Court of Appeals in United States v. Goodwin, cert. granted No. 80-2195 (November 30, 1981). Petitioner also contends that, regardless of the result in Goodwin, the decision in Bordenkircher v. Hayes, 434 U.S. 357 (1978), mandates reversal. These arguments will be addressed in turn.

A. Petitioner's attempt to link this case to Goodwin fails because of critical factual discrepencies between the two cases.[2/] In Goodwin, the information which later justified an increase in charges was not known to the United States Attorney's Office at the time the defendant asserted his right to go to trial. The trial court clearly found

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2/ The issues raised in Goodwin, which petitioner seeks to raise in this case, involve the applicability of the "vindictive prosecution" doctrine to pre-trial proceedings. This issue (as opposed to the issue of any conflict between Bordernkircher and this case) was not raised by petitioner in the trial court, in its briefs or argument to the Court of Appeals, or in its Petition for Rehearing. Petitioner thus should not be allowed to raise this issue for the first time in this Court. United States v. Santana, 427 U.S. 38, 41, n. 2 (1976)

that the purpose for the increase in charges was to correct a charge which was no longer appropriate. The Court of Appeals did not reject this explanation as untrue, but found it insufficient as a matter of law because the information was "available to the Government, if not from the outset, at least prior to Goodwin's election of a jury trial." 637 F.2d 250, 255 (4th Cir. 1981).

In sharp contrast to the facts in Goodwin are those in the present case. The initial charge was made, not by a police officer, but by an Assistant United States Attorney. That Assistant had before him and considered all of the evidence later used to justify the increase in charges. He made a conscious choice to charge a misdemeanor, knowing that respondent could have been charged with a felony, based on the evidence before him. In addition, Mr. Phillips, who decided to increase the charges, provided all that evidence to defendant's counsel, reviewed the files of the case agent, met with two Secret Service agents, and provided additional discovery, all several days before deciding to file a superseding indictment.

Petitioner advanced four reasons for its increase in the severity of charges. Two of these related to the wording of the original information, both the omission of a scienter allegation and the disparity between the actual value of the check and the charged value. That these factors did not necessitate an increase in charges is evidenced by the superseding misdemeanor information that was eventually filed. [App. D, 51a] The other two reasons related to respondent's criminal record and his alleged involvement in related schemes, both of which were known to and considered

by the United States Attorney when the misdemeanor was charged [App. A, Exhibits G and B, 19a - 25a, 6a]. In contrast to Goodwin, where the initial prosecutor was someone not experienced with United States Attorney policies, the initial prosecutor here was an experienced prosecutor and the Assistant who increased the charges was inexperienced [P. App., 15a].

Perhaps the most critical distinction between Goodwin and the present case is that in Goodwin, the trial court accepted the Government's explanation for the increased charges. In this case, the trial court specifically rejected the petitioner's claim that its reason for superseding was to correct a charging error, rather than a response to the assertion to the right to trial. [App. C, 49a - 50a]

Because of these peculiar factual circumstances, it should be evident that the result in this case is in no way controlled by the outcome in Goodwin. Unless this Court rules that the entire doctrine of "vindictive prosecution" can never apply in pre-trial proceedings, and that a prosecutor's increase in charges is immune from examination under any circumstances [except after appeal], the decision in this case would be upheld under any potential standard, including that of any of the various Courts of Appeals.

These standards could include a presumption of vindictiveness, e.g.United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976), a multi-factor balancing test, United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), or even a presumption of validity. But these presumptions become irrelevant if the trial court finds that

the prosecutor's explanation for increased charges is false. For example, petitioner cites to dicta in the Fifth Circuit that "explanations which would negate vindictiveness could include . . . a different approach to prosecutorial duty by the successor prosecutor . . . ." Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1971). This hardly means that a vindictive prosecution motion must be denied every time a prosecutor profers this explanation, even if the trial court disbelieves that explanation.3/

Petitioner confuses two distinct questions: what explanations, if believed, will be accepted as adequate justification for increased charges, and whether such explanation is believed in a particular case. The first of these questions, a matter of legal standards, is an appropriate one for this Court to address. It may well be addressed in Goodwin, since the trial court believed the Government, with the Fourth Circuit holding such an explanation to be legally inadequate. But whatever standard Goodwin enunciates on this question, it is inconceivable that this Court will hold a particular explanation to be adequate as a matter of law, even if that explanantion is found to be untrue. Thus, given the findings of the trial court, petitioner is asking this Court to substitute its judgment for that of a trier-of-fact on the second question, a factual question. Since there is substantial evidence in

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3/Petitioner cites United States v. Ricard, 563 F.2d 45 (2nd Cir. 1977) as also allowing the "different approach" justification. The opinion makes clear, however, that the decision to increase charges was made before defendant asserted any right. There was thus no appearance of vindictiveness to rebut, by the "different approach" claim, or otherwise.

the record to support those findings,[4] the judgment should be upheld, regardless of the particular standards enunciated in Goodwin.[5]

B. Petitioner argues that, regardless of the outcome in Goodwin, the holding in Bordenkircher mandates reversal in this case. This erroneous contention results from ignoring the critical item in the chronology of events in this case, the assertion of a right; and from placing an undue emphasis on the last event, the giving of some choice to respondent.

In Bordenkircher, the prosecutor informed defendant that if he did not plead guilty to a lesser charge, the prosecutor would supersede with a greater charge. This was done before defendant asserted any constitutional or statutory right. The essential difference between Bordenkircher and the present case is well described in Bordenkircher itself:

> [Defendant] was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the

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[4] This evidence includes the fact that the "defects" in the original information were easily cured by a new misdemeanor charge, without increasing the charge, and that all facts justifying the increase were known to and considered by the original Assistant in deciding that a misdmeanor was more appropriate than a felony. In addition, the new Assistant handled discovery a week before learning that the respondent was asserting his trial rights, and only after that considered increasing charges.

[5] This assumes that this Court rejects petitioner's assertion of a conflict between this case and Bordernkircher, discussed in part B.

> prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty.

434 U.S. at 360.

In sharp contrast to Hayes, the defendant in that case, respondent CURRIE was never informed that he would face felony charges when he insisted on going to trial on the misdemeanor information. Instead, the facts in this case fit exactly the situation that Bordenkircher distinguishes from legitimate plea bargaining. In the words of Bordenkircher, after CURRIE's counsel had informed the Government that the case would be going to trial, "the prosecutor, without notice [superseded with a] more serious charge after [discussions] relating only to the original [information] had ended with the defendant's insistence on pleading not guilty." 434 U.S.at 360.

Bordenkircher restates this distinction in other terms, and again CURRIE's situation is clearly contrasted to Hayes'. ". . . [The] imposition of a penalty upon a defendant who had chosen to exercise a legal right . . . [is] a situation 'very different from the give-and-take negotiation common in plea bargaining . . . .'" 434 U.S. at 362, citing Parker v. North Carolina, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.).

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This critical difference between the facts in Bordenkircher and those of the present case can be seen from another perspective. In Bordenkircher it was clear to all parties from the very outset that defendant had only two choices: plead guilty to the lesser charge, or go to trial with the higher charge. When Hayes rejected the former option, the latter naturally took effect. Going to trial on the lesser charge was in fact never an option.

> As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

434 U.S. at 360-61.

It can hardly be said respondent CURRIE's situation would have been no different if he had originally been indicted on the felony and offered a misdemeanor in exchange for pleading guilty. This is because after the prosecutor made a conscious decision that a misdemeanor was the appropriate charge, CURRIE was faced originally with the options of pleading guilty or going to trial on the misdemeanor. It was only after he had asserted his right to trial that the second prosecutor, without notice, presented defendant with a new, harsher set of options: pleading guilty to the misdemeanor or going to trial on a felony.

Seen from the point of view of the prosecutor, the two cases are again totally different. In Bordenkircher, the

prosecutor's decision that the greater charge was appropriate, should the matter proceed to trial, was a result of his evaluation of the entire case. Here, as the trial court found, the decision to enhance charges was based solely on the assertion of a right.

Bordenkircher held that, in bona fide plea negotiations, the prosecutor's desire to induce a guilty plea is a legitimate, non-vindictive motive. In addition, the fact that a defendant in plea negotiatons is given a choice (albeit an unpleasant one) establishes that he is not being punished or coerced. 464 U.S. at 363. Faced with the fact that CURRIE's assertion of his rights did not arise in a plea bargaining context, the Government attempts an incredibly broad extension of Bordenkircher's holdings to the following: whenever the prosecution's motive is to obtain a guilty plea, its act of superseding with increased charges in response to a defendant's assertion of a right is an act immune from judicial review. The Government's further extension of Bordenkircher would be: whenever the prosecution's actions leave the defendant with some choice of pleas, the entire sequence of events should be characterized as plea bargaining and exempt from the court's inquiry.

The fallaciousness of this approach can be seen from a hypothetical example. In Blackledge v. Perry, 417 U.S. 21 (1974), the defendant asserted his right to a trial de novo on a misdemeanor charge. The prosecutor then obtained a felony indictment. This Court held this response to be a violation of the Due Process Clause, because it would deter

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most defendants from asserting that procedural right.[6/]

Had the prosecutor in Blackledge, after bringing the felony charges, told the defendant he could instead plead guilty to the original misdemeanor, would this option have rendered the prosecutor's actions permissible? Clearly not, for then any prosecutor could undo the entire effect of Blackledge and deny any person the procedural right which that case protected from a vindictive response, simply by calling his response "plea bargaining."

Petitioner continually focuses on the plea offer made after petitioner asserted his right to trial. By so doing, petitioner not only misconceives the applicability of Bordenkircher, but misconstrues the logic of the trial court and the Ninth Circuit. The issue in this case has nothing to do with which party initiates plea negotiations [Petition, 16]. The question is when such negotiations occur. If, as in Bordenkircher, defendant has asserted his right to trial, knowing that this decision entailed facing higher charges, then his "fully informed" (434 U.S. at 360) decision would have been constitutionally induced. But where, as here, the Government responded after defendant's decision, without any intervening factors, that response is vindictive.

Corbitt v. New Jersey, 439 U.S. 212 (1978), also upholds as legitimate the Government's interest in encour-

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6/ The opinion noted that the motives of the prosecutor in Blackledge presumably were to discourage defendant from going to trial. 417 U.S. at 27-28. This is the same motivation which the Government suggests is immune from attack in this case.

aging guilty pleas. But it upholds that interest in a context comparable to Bordenkircher's. A defendant under New Jersey's system knows that if he forgoes his right to a jury trial, he may get a lower sentence than if he asserts that right. Corbitt in no way suggests that an interest in encouraging guilty pleas allows the Government unilaterally to "up the ante" after defendant has asserted his rights, uninformed of the penalty this assertion entails.

The trial court in this case suggested that the law has created an anomalous result: a prosecutor may not increase charges after an assertion of the right to trial, but could file misdemeanors and routinely attach to them the warning that a refusal to plead guilty would result in the filing of felony charges [R.T. 35]. If such a procedure is indeed anomalous, it is consistent with the reasoning in Bordenkircher. This Court, in order to preserve plea negotiations, had to distinguish between punishing the assertion of rights and inducing the foregoing of rights. It did so by distinguishing between unilaterally responding after the defendant has asserted his right (punishing) and letting a defendant know from the beginning what is entailed in his choice (inducing). This case clearly falls in the former category.

Petitioner contends [Petition, n. 9, n. 11] that the decision of the Court of Appeals impedes legitimate plea bargaining, because the "pro forma entry of a plea of not guilty" would normally precede any negotiations. Petitioner apparently fears that a court would thus see any increased charges as an impermissible response to that plea. But the opinion specifically addresses that concern at note 2. The

court distinguishes this case from the situation discussed by petitioner, since the increase in charges here did not follow a "pro forma" plea which simply served as a start of proceedings, possibly leading to bargaining. The increase instead followed, and was a direct reponse to, an actual decision to go to trial, "made at a time when that decision was anything but preliminary."

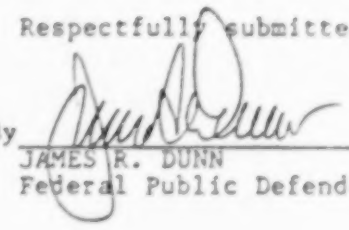
In sum, this case does not raise the issue of the legitimacy of plea bargaining, the motives behind it, or the fact that such negotiations involve difficult choices for defendants. It involves, instead, the differences between informed choices, made in the course of plea bargaining, and choices to which the Government unilaterally responds by exacting a penalty. The trial court found, on the record before it, that this case involved the latter. That finding should be upheld.

V

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

By 
JAMES R. DUNN
Federal Public Defender

DATED: May 26, 1982

Appendix

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

FILE 403-65,660

January 24, 1980

Los Angeles Field Office
300 N. Los Angeles Street,
Room 4324
Los Angeles, California 90012

The Honorable Andrea S. Ordin
United States Attorney
Central District of California
Los Angeles, California 90012

for
agency
without the express permission of
the U.S. Secret Service.

DEFENDANT

James Edward Currie

VIOLATIONS

18 USC 641

Dear Mrs. Ordin:

DETAILS OF OFFENSE

On March 5, 1979, James Edward Currie, sold a U. S. Treasury check, to wit: U. S. Treasury check #15,016,742; symbol 4003; dated 3/1/79; payable to Robert L. Rowley in the amount of $317.60, to an undercover Special Agent of the U. S. Secret Service for $100 cash; in violation of Title 18, USC Section 641.

CRIMINAL RECORD

James Edward Currie (See aliases on page 3, SA Corry's M/R, dated 9/11/79), has an extensive criminal record dating from 1954 for burglary, petty theft, auto theft, escape, armed robbery, shoplifting, possession of marijuana, possession of controlled substance for sale, and possession of a hype kit. His most recent identifiable arrest on 3/18/79 was for burglary.

A copy of Currie's California Bureau of Identification record is attached. A copy of Currie's FBI Record has been requested and will be made available to you in the near future.

BUY ... BONDS AND SAVE

U.S. Attorney 90015 148-65

WITNESSES

Carl Williams Special Agent	U. S. Secret Service Federal Building, Rm 4324 300 N. Los Angeles St., Los Angeles, CA 90012	688-4830
James A. Corry Special Agent	U. S. Secret Service Federal Building, Rm 4324 300 N. Los Angeles St., Los Angeles, CA 90012	688-4830
Robert L. Rowley Payee	35 John Street Newburgh, N.Y. 12550	914/565-3888

ATTACHMENTS

Investigative Report of SA Ortman, dated 5/8/79.
Investigative Report of SA Corry, dated 9/11/79.
Investigative Report of SA Macrino, dated 12/31/79.
Copy of payee's Claim Form.
Copy of U. S. Treasury check.
Copy of FBI Rap Sheet.

Very truly yours,

James A. Corry
James A. Corry RSW
Special Agent

APPROVED:

Larry B. Sheafe
Larry B. Sheafe RSW
Special Agent in Charge

EXHIBIT D

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

ORIGIN Field OFFICE Los Angeles, California CASE NO. 403-65660

TYPE OF CASE	STATUS	TITLE OR CAPTION
Check Larceny	Continued	Robert L. Rowley - Payee
INVESTIGATION MADE AT	PERIOD COVERED	
Los Angeles, CA	3/5/79	
INVESTIGATION MADE BY		
SA Charles E. Ortman		

DETAILS

SYNOPSIS

Stolen U.S. Treasury check sold to undercover agent by a Negro male who identified himself as "Bucky Garrett".

- "Bucky Garrett" to be located and arrested.

(A) DETAILS OF INVESTIGATION:

This case originated in the field on 3/5/79 when SA Carl Williams, in an undercover capacity, met with an individual known as "Bucky Garrett".

1. Payee Interview

On 5/4/79, I telephonically interviewed the payee, Robert L. Rowley, 2101 Ewing St., Los Angeles, CA, 662-2433. Rowley stated that he does not know anyone named "Bucky Garrett" and he did not give anyone permission to have the subject check in their possession.

3. Handwriting/Photostat Files and Office Indices

The above files were check and no associations were made.

DISTRIBUTION	COPIES	REPORT MADE BY	DATE
Los Angeles	Orig. & 1cc	C. E. Ortman	5/8/79
L.A. City Attorney	3cc's	SPECIAL AGENT Charles E. Ortman	
		APPROVED William R. Barton	DATE
	C&O-cc	SPECIAL AGENT IN CHARGE William R. Barton	5/8/79

MEMORANDUM REPORT (COMMUNUS ON PLAIN PAPER) SSP 1333 (03-77)

U.S. Attorney

U.S. GOVERNMENT PRINTING OFFICE: 1977-731-825

4. Other Investigation

On 3/5/79, SA Carl Williams, while acting in an undercover capacity, went to the Harold Hotel, to meet with one "Red Brown" in room 302 and purchase stolen U.S. Treasury and other checks. When SA Williams arrived at room 302, "Red Brown", later identified as Arthur H. Biegas, let SA Williams into the room. An individual who identified himself as "Bucky Garrett" was laying on the bed.

SA Williams conducted a transaction with Red Brown, purchasing a stolen private business payroll check, and when the sale was completed, "Bucky Garrett" produced the subject U.S. Treasury check from inside his shirt and offered it for sale to SA Williams. SA Williams noted the face value of the check was $317.60, and he offered Garrett $100 for the check. Garrett agreed, and SA Williams gave Garrett $100 in genuine U.S. currency for the check. The subject check was unendorsed.

After the sale of the above check was completed, Brown and Garrett told SA Williams of their plans to steal numerous U.S. Treasury and Los Angeles County checks from the Post Office in Pasadena, CA, on 3/15/79.

After this conversation, SA Williams left the Harold Hotel. SA Williams initialed and dated the subject check and turned the check over to me in the Los Angeles Field Office.

(B) SUSPECT

Unknown Negro Male - aka Bucky Garrett, 35 - 40 years old, 5'7", 150 to 160 lbs., black hair, brown eyes, hangs out in the "Skid Row" area of downtown Los Angeles, frequents the Harold Hotel, 323 E. 5th St., Los Angeles.

(C) UNDEVELOPED LEADS

Case to be presented to City Attorney's Office for Complaint and Warrant.

Bucky Garrett to be identified and arrested.

EXHIBIT C

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

ORIGIN Field OFFICE Los Angeles, California CASE NO. 403-65,660

TYPE OF CASE	STATUS	TITLE OR CAPTION
Check Larceny	Continued	Robert L. Rowley - Payee

INVESTIGATION MADE AT: Los Angeles, California — PERIOD COVERED: 5/8/79 - 8/30/79

INVESTIGATION MADE BY: SA James J. Corry

OFFICE USE ONLY
This material [illegible] for official use [illegible] disclosure to [illegible] parties or [illegible] agency without the express permission of the U.S. Secret Service.

DETAILS

SYNOPSIS

"Bucky Garrett" who sold stolen subject check to undercover agent has been identified as James Edward Currie.

Case continued pending interview of payee, Robert L. Rowley by White Plains RA.

(A) DETAILS OF INVESTIGATION

Reference is made to all previous M/R's in this case the most recent being that of SA Ortman, Los Angeles, dated 5/8/79.

1. Payee Interview

On 8/22/79, I telephonically interviewed payee, Robert L. Rowley at 914/565-3888, as a result of information supplied to me by his brother, William Rowley of 571 South Cornado Apt. 402. Payee Stated that he is presently residing at 35 John Street, bottom floor, Newburgh, New York, 12550. Payee stated that his DOB: is 11/28/47; SSN 070-40-8712. Payee stated that he moved to Newburgh, New York in December of 1978 and that he had not received subject check in this case. Payee stated that he would be interested in being personally interviewed by this Service in order to file claim on his check.

DISTRIBUTION	COPIES	REPORT MADE BY	DATE
Los Angeles	Original &1cc	SPECIAL AGENT James A. Corry	8/31/79
New York	1cc	APPROVED	DATE
White Plains RA	1cc w/att.		
LA City Atty's	3cc	SPECIAL AGENT IN CHARGE William R. Hatton	9/11/79

MEMORANDUM REPORT (CONTINUED ON PLAIN PAPER)

U.S. GOVERNMENT PRINTING OFFICE: 1977-731-825

U.S. Attorney

4. Other Investigation

On 8/22/79, I interviewed Lt. Larry Welch of the Central Vice Bureau. Welch stated that he believed that suspect Garrett has a sister who works in the Deans Office at the University of Southern California.

On 8/23/79, I called Blossie Kelly at 213/741-2421. Kelly stated that a "Bucket Garrett" worked for the family in the past and had assumed the family's last name of Garrett. She stated that Garrett's correct name could be obtained from her mother, Ella Broussard, at 480 Deo Dara, Los Angeles, California, phone number 664-0754.

On the same date, I called Mrs. Broussard, who stated that the individual known to her as "Bucket Garrett" had a true name of James Currie. Mrs. Brossard described Currie aka Garrett as a Male Negro; 41 years of age; has an over size head; beard, missing several front teeth, and has bad steam burns on his feet. She also classified Currie as a drug addict. Mrs. Broussard claimed that Currie had burglarized her home on 5/8/79 and that a better description could be obtained from the Altadena Substation of the Los Angeles County Sheriff's Department.

On 8/23/79, I called Dep. Juanita Dearborn of the Altadena Los Angeles County Sheriff's Office, at telephone number 796-1131. Dearborn stated that James Edward Currie is a male Negro; DOB: 1/1/40; 5'9"; 163 lbs., black hair; brown eyes; last known address of 323 East 5th Street, Los Angeles, California. She stated that he has also used dates of birth of 1/1/38 and 1/1/39 in the past.

On 8/29/79, I received from the State of California Bureau of Identification Department of Justice a copy of James Edward Currie's criminal record. It should be noted that he has extensive arrests for Burglary, Petty Theft; Escape; Auto Theft; Attempted Robbery; Armed Robbery; Shoplifting; Possession of a Controlled Substance for Sale; Possession of a Hype Kit; and Possession of Marijuana.

On 8/29/79, I obtained from the Los Angeles Police Department (3) three photographs of James Edward Currie taken on 4/4/79, the date of his most recent arrest. At that time, he had been arrested for Possession of a Hype Kit.

(B) SUSPECT

James Edward Currie - aka Buckey Garrett, aka Bucket Garrett, aka James Melvin Edward Currie, aka John Edward Thomas, aka Raymond Johnson, aka James Edward Curry, aka Jessie Eugene Otis, aka James Johnson, aka James Edward Currie, aka Robert James Jackson, aka Henry Jackson, aka James Garrett, described as a Negro male; DOB: 1/1/40; 5'9"; 165 lbs., black hair; brown eyes; CII #829-139; FBI #570-546-B; SSN 562-02-2628; last known address 323 East 5th Street, Los Angeles, California.

(C) UNDEVELOPED LEADS

White Plains RA is requested to interview payee, Robert L. Rowley at 35 John Street, bottom floor, Newburgh, New York, 12550, home telephone number 914/565-3886. Claim form should be obtained and payee interviewed as to his acquaintance with James Edward Currie. It may be that payee, Rowley knows suspect Currie as "Bucket Garrett". Handwriting exemplars should be obtained from payee. Payee should be questioned as to his availability for testimony in any further criminal proceeds in Los Angeles.

(F) ATTACHMENTS

White Plains RA:

Copy of M/F, by SA Ortman, dated 5/8/79.
One photograph of suspect, Currie.
Copy of check photostat.

EXHIBIT D

UNITED STATES SECRET SERVICE
THE DEPARTMENT OF THE TREASURY

FROM JAC 9/11/79	OFFICE		FILE NO. 803-65,669
~~Los Angeles~~	STATUS White Plains	TITLE OR CAPTION	
Check Larceny	Closed, White Plains	Robert L. Rowley - Payee	
INVESTIGATION MADE AT	PERIOD COVERED		
Newburgh, N. Y.	12/20/79		
INVESTIGATION MADE BY			
Special Agent John Rodrigues and Special Agent Paul Macrino			

FAILS

SYNOPSIS

The payee has been located and interviewed. A TUS 1133C Claim Form was executed and a written statement obtained.

Case is closed in White Plains.

RECEIVED
U.S. SECRET SERVICE
JAN 8 12 52 PM '80
LOS ANGELES, CALIF.

(A) DETAILS OF INVESTIGATION

Reference is made to the M/R of SA Corry, Los Angeles, dated 9/11/79, requesting this RA to locate and interview the payee.

1. Payee Interview

On 12/20/79, SA Rodrigues and I located the payee at 35 Johnes Street, Newburgh, New York. I allowed Rowley to examine the check photocopy and the photograph of James Currie. Rowley executed an 1133C Claim Form and provided a written statement indicating that he never received the subject check; never gave anyone permission to sign or negotiate any U.S.Treasury check, and that he recognized the photograph as a person he knows as "Bucket", who was an acquaintance of his when he lived in California. Rowley also stated that his brother, William, also knew "Bucket" because they spent time in jail together.

Rowley stated that he would be willing to go to California to testify against Currie but would not testify against his brother if his brother was involved. Rowley initialed and dated the photograph of Currie.

(D) DISPOSITION

Case closed, White Plains.

~~Los Angeles~~	Orig.& 1 cc. w/ attach. 1 cc.	REPORT MADE BY Paul Macrino SPECIAL AGENT	12/31/79
New York (White Plains) PM:CP		APPROVED Paul A. Scanlon SPECIAL AGENT IN CHARGE	12/31/79

U.S. GOVERNMENT PRINTING OFFICE: 1977-241-525

(CONTINUE ON PLAIN PAPER)

WORK FILE

(E) ATTACHMENTS

Los Angeles: TUS 1133C Claim Form, and statement executed by Robert Rowley.
Photograph of James Currie initialed and dated by Robert Rowley.

SSF 1607A executed by Robert Rowley.

EXHIBIT E

CLAIM AGAINST THE UNITED STATES
FOR THE PROCEEDS OF A GOVERNMENT CHECK OR CHECKS

I am the payee and owner of the following-described check and, having examined a photocopy of the check ~~[illegible]~~ declare that I did not in any manner participate in any part of the proceeds and I hereby make claim for the amount of the check. In support of this claim I make the following statements which I declare to be true to the best of my knowledge and belief:

SYMBOL	CHECK NO.	DATE	AMOUNT
4003	15, 016, 742	3/1/79	$317.60

PAYEE: Robert (L.) Rowley

	(Answer fully)
Was the check received, or did you ever see it?	NO
Did you endorse this check?	NO
Was the endorsement of your name on the check made with your consent or by agreement or understanding with anyone?	NO
State the purpose for which the check was issued.	SSI
Give your identification number relative to the check, such as Social Security, Military Service, Veterans compensation, etc.	070-40-8712

WARNING.-Title 18, Sec. 287, U.S. Code: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Signature of witness: [illegible]
Witness: [illegible]
Address of witness: 11555 White Plains, NY
Signature of witness: [illegible]
Address of witness: 11555 White Plains, NY

Signature of claimant: [illegible]
Address: 35 [illegible]
City & State: Newburgh, NY
Date Signed: 12/20/79

TREASURY FORM 2355C (Rev. 4-72)

DEPARTMENT OF THE TREASURY - Treasurer, U. S.

NOTICE

The following information is for investigative purposes and YOU MUST ANSWER ALL QUESTIONS FULLY.

If your present name differs from that on the FACE of the check, explain the reason therefor.	N/A
If an address is given on the face of the check, state whether you	(a) ever lived at such address: ☒ YES ☐ NO — (b) ever received your mail there: ☒ YES ☐ NO
What was your mailing address on the date of the check?	35 Johnson ST Newburgh, NY — Did you also live at this address? ☒ YES ☐ NO
If you had changed your address, did you so advise a Government Office?	☒ YES ☐ NO — Which one? SSA Glenndale, CA.

What are the names, addresses, and relationship to you of the persons who resided at the address shown on check?

NAME	ADDRESS	RELATIONSHIP
Lisa Rowley	2161 Kingsley ST LA, CA	Daughter
Kathleen	"	Step Son
Robert	"	Step Son

Do you have any reason to believe that the check was endorsed, or that the proceeds were received by any person whose name is listed in the answer to No. 10 above.	☐ YES	☒ NO	☒ YES (by any associate)	☐ NO	☐ YES (by any member of your family) ☐ NO
If your answer to any of the above questions is "YES", give name and address of person suspected.	My Brother Richard James Corbett				
Were you ever in the establishment where the check was cashed?	☐ YES	☐ NO	Are you known there?	☐ YES	☐ NO
Where did you usually cash your checks at the time the above-described check was cashed?	Commerce Inc 7th ST + Broadway LA. CALIF.				
Give any other facts known to you regarding the forging or cashing of the check.					
Give the name and address of your present place of employment.	(None)				Telephone No.
Print or type your correct name and mailing address	35 Johnson ST 1ST Floor Newburgh, NY 12550				ZIP Code

17. Signature of payee: X Robert X. Rowley

Full street address: 35 Johnson ST

City & State: Newburgh, NY Zip Code: 12550

Signature of Co-Payee if applicable:

Telephone Number (914) 565-3888

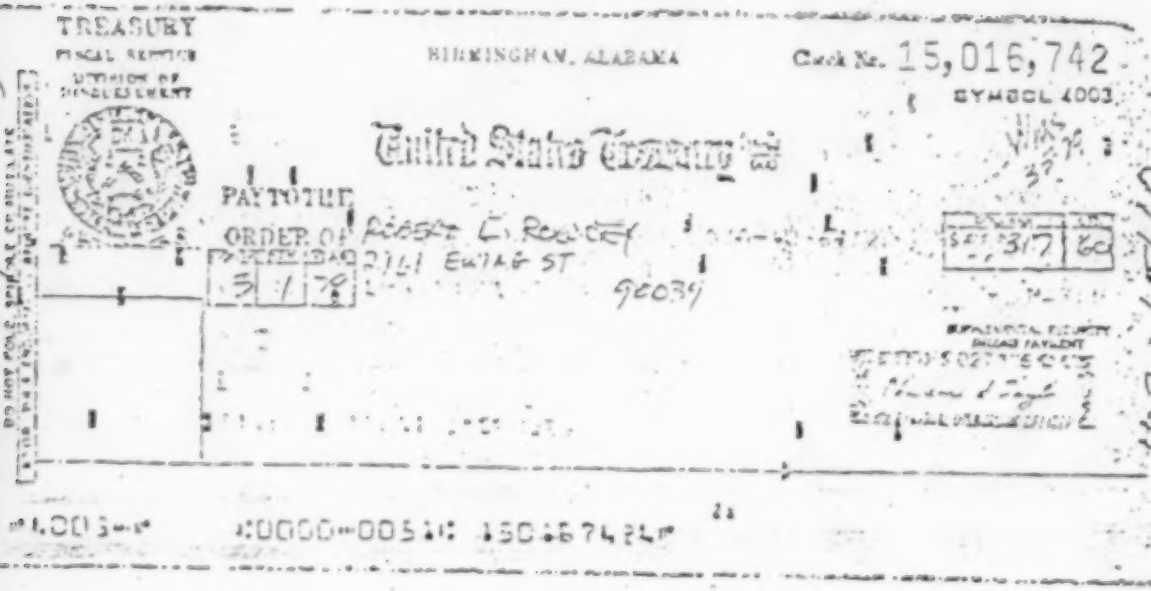

TREASURY
FISCAL SERVICE
BUREAU OF
BIRMINGHAM, ALABAMA
Check No. 15,016,742
SYMBOL 4003
United States Treasury
PAY TO THE
ORDER OF
3 1 78
317 60
9603
403-65760

EXHIBIT G

STATE OF CALIFORNIA

BUREAU OF IDENTIFICATION

Department of Justice

P. O. BOX 13417
SACRAMENTO 95813

4001 C STREET

August 27, 1979

U.S. Secret Service
300 N. Los Angeles St., Rm#4324
Los Angeles, CA 90012

Attention: Jim A. CORRY

Address replies to:
Command Center
Ivalou Woodridge
Phone: (916) 445-9240
CII #: 829 139
Your: 8-23-79
Subject: James E. CURRIE

XXXXX Subject(s) has/have been identified with a previous record in our files; record transcript(s) enclosed.

____ No record found on the basis of information furnished with your inquiry.

____ Subject(s) may be the same as described in the enclosed record transcript(s).

____ Photograph(s) enclosed.

____ Copy of fingerprint card(s) enclosed.

____ Other:

RECEIVED
U.S. SECRET SERVICE
LOS ANGELES, CALIF.
AUG 29 2 14 PM '79

Sincerely,

ROBERT E. SCOTT, Program Manager
Special Services

Enc. 1
aj

BID 8046 (r 5/79)

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
BUREAU OF IDENTIFICATION
P.O. BOX 13417, SACRAMENTO

FBI# 570 546 B
SN # 562 02 262

The following CII record, NUMBER 829 139 IS FOR OFFICIAL USE

TTT 1 4
AAA 1 4

M N BLK BRO 5-9 160 TN 1-1-1938

CURRIE: JAMES EDWARD

ARRESTED OR RECEIVED	DEPARTMENT AND NUMBER	NAME	CHARGE	DISPOSITION
.IAS:	JAMES MELVIN EDWARD CURRIE; JOHN EDWARD THOMAS; RAYMOND JOHNSON; JAMES EDWARD CURRY; JESSIE EUGENE DAVIS; JAMES JOHNSON; JAMES EDWARD CURRIE; ROBERT JAMES JACKSON; HENRY JACKSON; JAMES GARRETT;			
19-54	PD ARCADIA JB-9770	JAMES CURRIE	459 PC BURG	REL TO PD MONROV
19-54	PD MONROVIA 8455	JAMES EDWARD CURRIE	459 PC BURG	REL AFTER INV
7-54	CALIF YOUTH AUTH 22138	JAMES EDWARD CURRIE	BURG	FROM: LOS ANGEL CO JUV CRT 11-10-55, PAROLED
-23-55	PD MONROVIA 15000	JAMES EDWARD CURRIE	PETTY THEFT	REL AFTER INV
-10-55	PD MONROVIA 8455	JAMES EDWARD CURRIE	488 PC PT	REL TO JUV CRT
-6-56	CYA NORWALK 22138	JAMES EDWARD CURRIE	RET PV	6-25-56, ESCAPED
25-56	PD SANTA MARIA 18656	JAMES EDWARD CURRIE	1)503 VC AUTO THEFT 2)ESCAPE	REL TO CYA AUTH
26-56	CYA NORWALK 22138	JAMES EDWARD CURRIE	RET ESCAPEE	11-7-56, PAROLED SEPT, 1959, DISCH

CONTINUED PAGE 2

ENTRIES INDICATED BY ASTERISK (*) ARE NOT VERIFIED BY FINGERPRINTS IN CII FILES.

AUG 28 2 16 PM '79
RECEIVED
U.S. DEPT. OF JUSTICE
LOS ANGELES, CALIF.

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
BUREAU OF IDENTIFICATION
P. O. BOX 13417, SACRAMENTO

The following CII record, NUMBER 829 139 IS FOR OFFICIAL USE ON

PAGE 2

ARRESTED OR RECEIVED	DEPARTMENT AND NUMBER	NAME	CHARGE	DISPOSITION
8-57	PD LOS ANGELES 397075-C/402662	JAMES EDWARD CURRIE	211 PC ROBB FEL	8-30-57, #193068, FOUND NOT GUILTY OF ATT ROBB
9-57	SO LOS ANGELES B-494525	JAMES EDWARD CURRIE	ATT ROBB (ARR BY PD LOS ANGELES)	
15-57	PD LOS ANGELES 397075-C	JAMES MELVIN EDWARD CURRIE	459 PC BURG FEL	12-18-57, REL
8-58	PD LOS ANGELES 397075-C/530279	JAMES MELVIN EDWARD CURRIE	WARR 211 PC ROBB FEL 4 CTS	8-12-58, #199371, 3 CTS 211 PC, FELS DISM; CONV 1CT 211 PC, 1ST DEG, FEL, COMM STATE PRISON SENT TO RUN CC W/ CS#199203
9-58	PD SOUTH GATE A-29564	JAMES MELVIN CURRIE	1) 211 PC ROBB STRONGARM 2) 245 PC ADW	
1-59	CALIF DEPT OF CORRECTIONS A-54495	JAMES MELVIN CURRIE	CS#199371 211 PC ROBB 1ST DEG CS#199203 211 PC ROBB 1ST DEG	FROM: LOS ANGELE CO TERM: 5YRS-LIFE 2 CTS CC 1-4-71, PAROLED TO LOS ANGELES CO
8-71 X	PD ARCADIA JB-25501	JOHN EDWARD THOMAS	211 PC ARMED ROBB	1-18-72, #A-54013 CONV 1CT 211 PC, 2ND DEG, FEL, JRY 3-7-72, COMM STATE PRISON, 153 DS CTS

CONTINUED PAGE 3

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STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
BUREAU OF IDENTIFICATION
P.O. BOX 13417, SACRAMENTO

he following CII record, NUMBER 829 139 IS FOR OFFICIAL USE ON

ARRESTED OR RECEIVED	DEPARTMENT AND NUMBER	NAME	CHARGE	DISPOSITION
7-72	CALIF DEPT OF CORR, RC, CHINO A-54495-A	JAMES EDWARD CURRIE	RET PV W/AC CS#A-54913 4 211 PC ROBB 2ND DEG W/2 PFC	FROM: LOS ANGELE CO TERM: 1YR-LIFE C WPT 9-17-75, PAROLED T LOS ANGELES CO
14-75	PD LOS ANGELES 397075-C/3615179	JAMES EDWARD CURRIE	11357 H&S POSS MARIJ FEL	3-29-76, #A-321531 JD#19100, CONV OF 11357 H&S, $100 FN + PA, CTS
-76 X	PD PASADENA 88307	JAMES JOHNSON	484 PC PT/SHPLFT	6-10-76, #M126515, JD#19470, CONV 484 PC, MISD, PG, $125 F
8-76	PD PASADENA 39749	JAMES EDWARD CURRIE	459 PC BURG RESIDENTIAL	
11-76	PD PASADENA 39749	JAMES EDWARD CURRIE	1) 459 PC BURG COMMERCIAL 2) 496 PC RSP 3) 32 PC ACCESSORY	
		CONTINUED PAGE 4		

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STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
BUREAU OF IDENTIFICATION
P. O. BOX 13417, SACRAMENTO

The following CII record, NUMBER 829 139 IS FOR OFFICIAL USE O

PAGE 4

ARRESTED OR RECEIVED	DEPARTMENT AND NUMBER	NAME	CHARGE	DISPOSITION
30-77	PD ARCADIA JB-30866/77-670	JAMES EDWARD CURRIE	211 PC ROBB	3-18-77,#A-55588 JD#19482,664/211 PC,FEL,DISM,INSUF EVID;CONV 236 PC, MISD,PG,180 DS JL
2-77	PD PASADENA 92490	JAMES EDWARD CURRIE	459 PC BURG RESIDENTIAL	9-15-77,REL 849B(PC,DEEMED NOT ARR DET ONLY,FURTH IN
27-77	PD PASADENA 92490	JAMES EDWARD CURRIE	11378 H&S POSS CONTR SUBS FOR SALE	10-28-77,REL 849B PC,DEEMED NOT ARR DET ONLY,FURTH IN
3-77	PD LOS ANGELES 397075/4553462	JAMES EDWARD CURRY	484A PC THEFT OF PERSONAL PROP MISD	11-4-77,#31582656 JD#19463,CONV 484 PC,MISD,PG,45 DS SUSP,12 MOS SUMM PROB W/O SUPV, $120 FN OR 4 DS J CRED $60 OR 2 DS, COMM
7-78	PD LOS ANGELES 397075/4923128	JAMES GARRETT	4143 B&P POSS HYPE KIT MISD	
8-78	PD LOS ANGELES 397075/4952562	JESSIE EUGENE OTIS	211 PC ROBB FEL	9-15-78,REL 849.5 PC,DET ONLY

CONTINUED PAGE 5

ENTRIES INDICATED BY ASTERISK (*) ARE NOT VERIFIED BY FINGERPRINTS IN CII FILES.

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
BUREAU OF IDENTIFICATION
P.O. BOX 13417, SACRAMENTO

The following CII record, NUMBER 829 139 IS FOR OFFICIAL USE O

ARRESTED OR RECEIVED	DEPARTMENT AND NUMBER	NAME	CHARGE	DISPOSITION
-15-78	SO LOS ANGELES 4990401/781461705	JESSE E. OTIS	487.3 PC GTA FEL	
-29-78	PD LOS ANGELES 397075/5076140	JAMES JOHNSON	211 PC ROBB FEL	
6-79	PD LOS ANGELES 397075-C/5097019	ROBERT JAMES JACKSON	211 PC ROBB FEL 1-17-79, REBK CS#31114673 12020 PC MISD	
8-79	PD LOS ANGELES 397075/5176395	HENRY JACKSON	459 PC BURG FEL	

ENTRIES INDICATED BY ASTERISK (*) ARE NOT VERIFIED BY FINGERPRINTS IN CII FILES.

EXHIBIT H

UNITED STATES GOVERNMENT

memorandum

DATE: September 7, 1980

REPLY TO ATTN OF: LAYN R. PHILLIPS
Assistant United States Attorney

SUBJECT: United States v. James E. Currie
CR 80-384

TO: Victor Kenton
Deputy Federal Public Defender

Dear Victor:

Yesterday I reviewed the file of Special Agent James Corrie, Secret Service, who is the case agent in the above case. Mr. Corrie is on annual leave until October 6, 1980. Following my review of his file, I am sending you the enclosed additional discovery materials. They include:

1) The initialed photograph of the defendant mentioned in my previous letter of 9/11/80;
2) The affidavit of payee Robert L. Rowley;
3) The September 12, 1980 report of SA James Corrie;
4) Handwriting sample of Robert L. Rowley;
5) Handwriting sample of the defendant; and
6) The personal history summary of the defendant.

The original of the check is being retrieved from Washington and will be available for your inspection upon receipt. Please call me should you have any questions.

Sincerely,

ANDREA SHERIDAN ORDIN
United States Attorney

Layn R. Phillips

LAYN R. PHILLIPS
Assistant United States Attorney
(213) 688-2475

LRP:sez

Encls

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

EXHIBIT 1

R.L.R.

12/20/79

W.T.

S.N.R. Maerum

12/21/79

EXHIBIT J

AFFIDAVIT

0

File No. _____

States of America
District of Newyork

_____ state that I have been advised by SA _____,
States Secret Service, that under the provisions of the Constitution I have
in rights: The absolute right to remain silent, and that anything I say can be
against me in a court of law or any other proceedings; that I have the right to
lt with an attorney before answering any questions or making any statements, and
if I cannot afford an attorney and want one, that one can be appointed for me
e I say anything; and if I decide to make any statements now, without an attorney
nt, I have the right to stop the questioning at any time.

ng and understanding these rights I hereby make the following statement:

I Robert L Rowley am the true payee
of U.S Treasury Check No. 15,016,742 symbol
Number 4003 dated 3/1/79 in the amount of
$317.60 payable to me. I never received this
check as I was living at 35 Johnes st
in Newburgh, NY from 12/74 to the present
time. Special Agent Macrum showed me a
photograph of a person I knew as "Bucket".
I know "Bucket" as an acquaintance while
I lived in California. My brother William Adler R.L.R.
knows "Bucket" because they served time 12/20/79
in jail together. SA Macrum showed me
a photocopy of the above described check. (over)

e read the foregoing statement consisting of 2 pages. I fully understand this
ment and it is true and correct to the best of my knowledge. I have made the
ections shown.

e this statement freely and voluntarily, without any threats, rewards or promises
munity in return for it.

X Robert L. Rowley

cribed and sworn to before
is day Dec. 20 1979

Paul J. Macrum
ture

Special Agent

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

ORIGIN Field OFFICE Los Angeles, California CASE NO 403-65,660

TYPE OF CASE	STATUS	TITLE OR CAPTION
Check Larceny-76210	Continued	ROBERT L. ROWLEY - PAYEE

INVESTIGATION MADE AT	PERIOD COVERED
Los Angeles, California	12/21/79 - 8/11/80

INVESTIGATION MADE BY

SA James A. Corry

DETAILS

SYNOPSIS

On 8/11/80, I located James Edward Currie in the Los Angeles County Jail, under the name of Henry Jackson. Currie has been interviewed and indicates he does not recall sale of subject check to SA Carl Williams on 3/5/79.

Copy of Federal Warrant #80-384, issued in the Central District of California, for James Edward Currie has been filed with Los Angeles Count Jail Warrants and Detainers Division.

Case continued.

(A) DETAILS OF INVESTIGATION

Reference is made to all previous M/Rs in this case, the most recent being that of SA Paul Macrino, dated 12/31/79, covering payee interview.

(4) Other Investigations

On 8/11/80, I determined that James Edward Currie was an inmate of the Los Angeles County Jail under the name Henry Jackson; booking #5544672. On that date, at approximately 8:30 PM, I personally interviewed Currie in the Inmate Reception Center of the Los Angeles County Jail. Currie was orally advised of his constitutional rights by the writer. Currie indicated he did not recall his sale of subject check to undercover agent Carl Williams on 3/5/79. Currie furnished handwriting exemplars on one SSF 1607A, and submitted to

DISTRIBUTION	COPIES	REPORT MADE BY	DATE
Los Angeles	Orig/1cc	SPECIAL AGENT James A. Corry	9/12/80
		APPROVED	DATE
	JAC:rjg	SPECIAL AGENT IN CHARGE Larry B. Sheafe	9/12/80

MEMORANDUM REPORT (CONTINUED ON PLAIN PAPER) SSF 1005 (03-77)

U.S. GOVERNMENT PRINTING OFFICE: 1977-731-825

being finger/palmprinted and photographed. Interview of Currie concluded at approximately 9:30 PM.

On that same date, I filed a copy of Federal Warrant #80-384 for James Edward Currie, in the Central District of California, with the Warrants and Detainer Division of the Los Angeles County Jail. It should be noted that Currie is presently incarcerated for burglary; 459 PC. His next court appearance on that charge is 9/24/80.

(B) SUSPECT

James Edward Currie - Described in the M/R of SA Corry dated 9/11/79.

(1) Judicial Action

On 4/28/80, a Central District Warrant (#80-384) was issued for the arrest of James Edward Currie for violation of Title 18, U. S. Code, Section 641, subsequent to the filing of an information by AUSA Rick Flamme.

On 8/11/80, I filed a copy of that warrant with the Los Angeles County Jail as previously referenced.

(C) UNDEVELOPED LEADS

Case continued pending release of Currie from State custody and conversion to Federal custody, with subsequent Federal prosecution.

EXHIBIT L

UNITED STATES SECRET SERVICE

FORM 1607A

OFFICE: ____ FILE No. ____

NAME: Robert F. Rosh

STREET ADDRESS: 35 Johnson St

CITY: Newburgh STATE: New York

PLACE OF BIRTH: Newburgh, New York

DATE OF BIRTH: 4/25/42 AGE: 32

HEIGHT: 5 Ft. 10 In. WEIGHT: 175 BUILD: Med.

COLOR OF HAIR: Brown COLOR OF EYES: Brown

RIGHT OR LEFT HANDED: right

OCCUPATION OR TRADE: Unemployed

WHERE NOW EMPLOYED OR LAST EMPLOYED: Unemployed have formerly

NAME, ADDRESS, and RELATIONSHIP of your NEAREST RELATIVE: Lue Rosh wife home

WRITE—DO NOT PRINT—CAPITAL AND SMALL LETTERS

A B C D E F G H I J K L M

N O P Q R S T U V W X Y Z

a b c d e f g h i j k l m

n o p q r s t u v w x y z

NUMBERS: 1 2 3 4 5 6 7 8 9 10

I The above is a specimen of my handwriting prepared freely and voluntarily.

DATE: 12/20/79 SIGNATURE: Robert F. Rosh

WITNESS: St. Paul Placencia

DATE: 12/20/79

EXEMPLARS OF: (PRINT)

Rosh Robert L.
Last Name First Name Initial

YEAR BORN: 1942 RACE: CC SEX: M

36A

Arthur Bob Charles

Don Edward Frank

George Henry Ivie

John Kennett Lamb

Mary Nan Olsen

Paul Quentin Robert

Samuel Tom Umphrey

Vernon Bill Xavier

Yolanda Zilfleon

1234 N. East Ave., SW

5678 S. West Blvd., NW

9012 E. North Pl., SE

3456 W. South St., NE

EXHIBIT M

HANDWRITING SAMPLE

NAME: James Edward Currie

STREET ADDRESS:

CITY: Los Angeles | STATE: California

PLACE OF BIRTH: Pinochle Texas | DATE OF BIRTH: 1-1-34 | AGE: 41

HEIGHT: 5' 9" | WEIGHT: 170 | BUILD: med

COLOR OF EYES: Brown | COLOR OF HAIR: Black | RIGHT OR LEFT HANDED: Right

PLACE OF EMPLOYMENT (OR LAST EMPLOYMENT):

OCCUPATION OR TRADE: Dog Grooming

NAME OF NEAREST RELATIVE: | RELATION:

ADDRESS:

WRITE – DO NOT PRINT – LETTERS

A a B b C c D d E e F f G g H h I i
J k L l M m N n O o P p Q q R r
S s T t U u V v W w X x Y y Z z

4756 N. 49th Street

1928 North 300 Ave

1922 North 300 West

3746 West Blvd. N.E

3746 West Blvd, N.E

5819 E South Terr. S.E.

5819 E South Terr S.E.

Abbot succeed elliott Leave simmer rod array essence Battle

What Succeed Effort Jungle Bionomic Dot Array Essence Battle

K. This Above is a Sample of my Normal Handwriting

THE ABOVE IS A SAMPLE OF MY NORMAL HANDWRITING

DATE: 8/11/80 | SIGNATURE: James Edward Currie

WITNESSED BY: D.W. Cox | DATE WITNESSED: 8/11/80 | EXEMPLAR'S OF (PRINT LAST NAME, FIRST NAME, INITIAL): CURRIE JAMES E

NUMBER: 413-65260 | OFFICE: LA 50 | YEAR BORN: 1939 | RACE: N | SEX: M

UNITED STATES SECRET SERVICE

SSF 1607A (8-79)

38A

EXHIBIT N

PERSONAL HISTORY SUMMARY

NAME (LAST, FIRST, MIDDLE) Currie, Jesse Edward	CASE NO.
ALIAS (LAST, FIRST, MIDDLE) "Bucket" Garrett	ALIAS (LAST, FIRST, MIDDLE)
NICKNAMES, STREET NAME	NICKNAMES, STREET NAME
ADDRESS Harold Hotel CITY LA	TELEPHONE NO.

EYES: ☐ Black (BK) ☐ Hazel (HZ) ☐ Blue (BL) ☐ Unknown (XX) ☒ Brown (BR) ☐ Artificial (Do not enter artificial eyes on SSF 1641) ☐ Gray (GY)

HAIR: ☒ Black (BK) ☐ Red (RD) ☐ Unknown (XX) ☐ Blonde (BN) ☐ Sandy (SN) ☐ Wig/Toupee (Do not enter wig/toupee on SSF 1641) ☐ Brown (BR) ☐ White (WH) ☐ Gray (GY) ☐ Bald (00)

RACE: ☐ Chinese (C) ☒ Negro (N) ☐ Indian (I) ☐ White (W) ☐ Japanese (J) ☐ Other (O)

DOB MM DD YY	SEX	HEIGHT	WEIGHT	HAIRSTYLE/LENGTH	MOUSTACHE	BEARD STYLE	AGE(S)
1 1 29	M	5'9"	170	med	yes	full	47

POB	SOCIAL SECURITY NUMBER	FBI NUMBER	LOCAL PD NUMBER
Memphis, Tenn.			

SCARS/MARKS: "Margaret" rt. bicep "B.J. Hunt" left chest "tick" - L hand web "Buck" L shoulder

PHYSICAL ODDITIES:

DATE OF ARREST MM DD YY	VIOLATION	ARRESTING AGENT	PLACE OF ARREST

RELATIONSHIP	NAME	ADDRESS	PHONE NO.
SPOUSE/ COHABITANT	none		
FATHER	Robert Currie	Compton	636-9662
MOTHER	deceased		
FATHER-IN-LAW			
MOTHER-IN-LAW			
CHILD	Claims none		
CHILD			
REFERENCE			
REFERENCE			
CAN USUALLY BE CONTACTED THRU			
IN CASE OF EMERGENCY	Isacie Currie (aunt)		234-4562
DEFENSE ATTORNEY			

MILITARY SERVICE ☐ YES ☒ NO	BRANCH OF SERVICE	MILITARY SERVICE NO.	SELECTIVE SERVICE NO.	SELECTIVE SERVICE BOARD AND ADDRESS
DATES OF ACTIVE DUTY		DATE OF DISCHARGE	TYPE DISCHARGE	
VA CLAIM NO.		DISABILITY CLAIMED		

UNITED STATES SECRET SERVICE

SSF 1599 (04 - 76)

OWN AUTOMOBILE	AUTOMOBILE AVAILABLE	DESCRIPTION OF AUTOMOBILE
☐ YES ☒ NO	☐ YES ☒ NO	

TAG NUMBER	TAG REGISTRATION (STATE/YEAR)	OPERATORS LICENSE NO. & STATE	YEAR	RESTRICTIONS
		None		

INS ALIEN NO.	DATE OF ENTRY	PORT OF ENTRY

BANK ACCOUNT NO.	TYPE	NAME AND LOCATION OF BANK
	☐ CHECKING ☐ SAVINGS	

CHARGE ACCOUNTS/CREDIT CARDS	ORGANIZATIONS

HOBBIES/SKILLS	PLACES FREQUENTED
Dry Cleaning	5th & Wall

LAST SCHOOL SUBJECT ATTENDED	PREVIOUS ARRESTS (DATES, AGENCY, CHARGE)
11th Gr. Honolulu H.S. 1953 grad	
PREVIOUS ADDRESSES AND DATES	

SCHOOLS ATTENDED BY CHILDREN

DATES OF EMPLOYMENT	NAME OF EMPLOYER	ADDRESS OF EMPLOYER	DUTIES PERFORMED
	Harold Hotel		utility man

REMARKS:
numerous Ritalin drug "blow out" scars from skin-popping.

COMPLETION OPTIONAL

PRINCIPAL TITLE OF CASE	CASE TYPE	AMOUNT INVOLVED	TYPE OF NOTE, CRIME, CHECK	MULTI-OFFENDER	CRIMINAL RECORD	CO-DEFENDANT
				☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO

PLACE OF PRELIMINARY PROCEEDINGS	DATE MM DD YY	RESULTS	BOND

PLACE OF GRAND JURY	DATE OF G.J. MM DD YY	JUDICIAL DISTRICT	RESULTS

TRIAL COURT	DATE OF PLEA	PLACE OF PLEA	PLEA
☐ Federal ☐ Municipal ☐ State ☐ Court Martial	MM DD YY		☐ Not Applicable ☐ Not Guilty ☐ Guilty ☐ Nolo Contendere

TRIAL JUDGE	DATE OF TRIAL	VERDICT

DATE OF SENTENCE MM DD YY	SENTENCING JUDGE	SENTENCE TO BE SERVED YEARS MONTHS DAYS	SUSPENDED SENTENCE YEARS MONTHS DAYS

PROBATION START DATE MM DD YY	PERIOD OF PROBATION YEARS MONTHS DAYS	FINE	FINE SUSPENDED
			☐ YES ☐ NO

PROSECUTION INDEX

☐ Preliminary Dismissed ☐ Held ☐ Dismissed ☐ Grand Jury No Bill ☐ Grand Jury True Bill ☐ Court Nolle Prosse ☐ Convicted ☐ Acquitted

EXHIBIT O

MEMORANDUM
FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA

FILE COPY

TO: Ralph Klein
Court Clerk

DATE: September 17, 1980

FROM: Victor B. Kenton
Deputy Federal Public Defender

RE: UNITED STATES vs. JAMES E. CURRIE
CR 80-364

The Assistant United States Attorney prosecuting this case is Layn Phillips, who arrived in the U.S. Attorneys Office on September 7. Consequently, I had no one to deal with, and did not receive my discovery until September 11. In a telephone conversation with Mr. Phillips on September 17, he advised me that if Mr. Currie chooses to testify in his own behalf, the Government would seek to impeach him on a 1971 state conviction for armed robbery under §211 of the California Penal Code.

Although I realize that the motion date is presently set for September 23, I wish to advise you that I commenced a trial before Judge Kelleher on September 16, I have motion hearings before Judge Williams on September 19, and I am commencing a jury trial before Judge Williams on September 23. These cases have been extremely time consuming. I do not anticipate being able to file any sort of written motion until after the September 23 trial is completed; however, I think it would be useful to hear the Motion In Limine well prior to the time of trial, since it may affect Mr. Currie's decision as to whether or not to waive jury.

Since Mr. Phillips has indicated to me that he does not oppose any order shortening time, I would suggest that the motion be calendared for the week of September 29. I would be able to file a Memorandum of Points and Authorities probably by September 26.

Please advise me as to the Court's decision on this request.

VBK:oa

cc: Layn Phillips
Assistant United States Attorney

FILE COPY

JAMES R. DUNN
Federal Public Defender
VICTOR B. KENTON
Deputy Federal Public Defender
1503 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4406
Attorneys for Defendant

RECEIVED A COPY OF THIS DOCUMENT
THIS 30th DAY OF Oct 1980
U. S. ATTORNEY'S OFFICE
BY Ec

FILED

OCT 30 1980

U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JAMES EDWARD CURRIE,
Defendant.

NO. CR 80-384-RJK

STIPULATION REGARDING DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR VINDICTIVE PROSECUTION; EXHIBITS

IT IS HEREBY STIPULATED and AGREED by and between plaintiff United States of America, through its counsel of record, and the defendant, JAMES E. CURRIE, through his counsel of record, Victor B. Kenton, as follows:

1. That this stipulation may be admitted in evidence for the purpose of this hearing as conclusive evidence that the facts stated herein are true;

2. That this stipulation shall have the same status and dignity as if the facts contained herein had been put in evidence by the testimony of witnesses who had appeared in person and testifi

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/ APPENDIX B

3. That the parties reserve the right to offer any additional evidence (a) to explain the circumstances surrounding any stipulated item, document, transaction or contractual agreement and/or (b) which may have a bearing on the issue of vindictive prosecution, on the part of the Government;

4. That all documents included in and which are a part of this stipulation are hereby deemed to be admitted in evidence at the hearing, without further foundation and are stipulated to be true and accurate copies of records of the transactions they reflect, made and maintained in the normal course of business of the Government or other agencies which generated these records;

5. That all declarations filed in support of and in opposition to this motion and exhibits attached to said declarations, are hereby deemed to be admitted in evidence at the hearing without further foundation and are stipulated to be true and accurate copies of records of the transactions they reflect;

6. That on January 30, 1980, the United States Attorney for the Central District of California, received a letter dated January 24, 1980, from James A. Corry, Department of the Treasury, United States Secret Service, detailing an alleged offense by defendant James Edward Currie (Exhibit A). Attached to this letter and received by the United States Attorney were the following documents:

a. Investigative Report of Special Agent Ortman, dated 5/8/79 (Exhibit B);

b. Investigative Report of Special Agent Corry, dated 9/11/79 (Exhibit C);

c. Investigative Report of Special Agent Macrino, dated 12/31/79 (Exhibit D);

d. Copy of Robert Rowley's claim form (Exhibit E);

e. Copy of the United States Treasury check (Exhibit F);

f. Copy of defendant Currie's FBI rap sheet (Exhibit G);

Exhibits A through G have been in the possession of the United States Attorney from January 30, 1980, until the present.

7. That after a review of the files of Special Agent James A. Corry, on September 16, 1980, Assistant United States Attorney Layn R. Phillips sent the following items to Deputy Federal Public Defender Victor B. Kenton, under cover of a letter (Exhibit H):

a. An initialed photograph of defendant Currie (Exhibit I);

b. An affidavit of Robert L. Rowley (Exhibit J);

c. Report of Special Agent James Corry, dated September 12, 1980, (Exhibit K);

d. Handwriting sample of Robert Rowley (Exhibit L);

e. Handwriting sample of defendant Currie (Exhibit M);

f. Personal history summary of defendant Currie (Exhibit N);

8. That on September 17, 1980, Deputy Federal Public Defender Victor B. Kenton sent, and Layn Phillips, Assistant United States Attorney received, a memorandum regarding preparation for trial (Exhibit O).

ANDREA SHERIDAN ORDIN
United States Attorney

By Richard B Kendall
RICHARD KENDALL
Assistant United States Attorney

JAMES R. DUNN
Federal Public Defender

By Victor B. Kenton
VICTOR B. KENTON
Deputy Federal Public Defender

DATED: This 30th day of October, 1980.

issue.

When you focus on a vindictive prosecution you focus on the Government's actions in a case, and also their motivations, if they can be perceived or were proceeding with a particular action.

So that whether if in fact the facts of this case justify a misdemeanor prosecution I don't believe is as relevant as what position the Government has taken before this Court in terms of what it states it believed.

THE COURT: Why is it bound by what it stated in its motion papers addressed to your first motion?

Why are they bound by what they said therein?

The Court rejected what they said. The Court didn't consider them bound. If it had, it would have denied your motion addressed to the indictment.

MR. KENTON: Because, Your Honor, the Government made representations to this Court in writing, which were made one week before the hearing, which were discussed last Friday, which they never retracted and which appeared throughout their papers as to what their belief was and their analyses of these facts were.

It is the Government that brings the case for prosecution.

THE COURT: Yes, but as just stated, the Court rejected this stated position that they somehow made an

unconscious error when they filed the information and that they merely were correcting the unconscious error by filing the superseding indictment.

The Court rejected that position and it took the view that what had really happened was, the Government knew all along it could have charged a felony, and in the exercise of its prosecutorial discretion it first elected to proceed on a misdemeanor basis by information and that the record that you then put before the Court thereafter convinced the Court that the reason the indictment was brought was not in order to correct an error they had made, and only later discovered, but indeed that they proceeded on the basis that the defendant, electing to go to trial, they were going to make him go to trial on the toughest charge they could make.

And so they caused the filing of the indictment.

That is the view the Court took. That is the basis upon which the Court dismissed the indictment. And in that light, and in view of that record, how can it be said that it is vindictive on the part of the Government to now go back to prosecute on the lesser charge which was initially filed?

MR. KENTON: I'd like to answer that in some detail, Your Honor.

FILED

ENTERED ON CCM/USAO

NOV 4 '80

Oct 31 2 31 PM '80

CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
BY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JAMES EDWARD CURRIE, Defendant	NO. CR. 80-384(B) RJK SECOND SUPERSEDING I N F O R M A T I O N (18 U.S.C. §641: Illegal Sale of Government Property)

The United States Attorney charges:

(18 U.S.C. §641)

On or about March 5, 1979, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD CURRIE, knowingly, willfully and without authority, sold, conveyed and disposed of property of the United States, namely, a United States Check,number 15,016,742 payable to Robert L. Rowley, having some value.

Andrea Sheridan Ordin
ANDREA SHERIDAN ORDIN
United States Attorney

WJS:ls

340 424 225 18.641-TO 20

JAMES R. DUNN
Federal Public Defender
VICTOR B. KENTON
Deputy Federal Public Defender
1503 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4406
Attorneys for Defendant
JAMES EDWARD CURRIE

COPY
AUSA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES EDWARD CURRIE, Defendant.	NO. CR 80-384-RJK NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENT DUE TO VINDICTIVE PROSECUTION; DECLARATION OF VICTOR B. KENTON; MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date: November 4, 1980 Time: 9:30 a.m.

TO: UNITED STATES ATTORNEY ANDREA SHERIDAN ORDIN AND TO ASSISTANT UNITED STATES ATTORNEY LAYN R. PHILLIPS:

PLEASE TAKE NOTICE that on November 4, 1980, at 9:30 a.m., or at such other time as the Court may order, defendant JAMES E. CURRIE will move the Court for an Order dismissing the Indictment in this action, on the basis that defendant's due process rights under the Fifth Amendment have been violated by a vindictive prosecution.

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RECEIVED A COPY OF THIS DOCUMENT
THIS 1st DAY OF Oct 1980
U. S. ATTORNEY'S OFFICE
BY
2:30

(3)

[C.R. 13]

This Motion is based on the attached Declaration of Victor B. Kenton, Memorandum of Points and Authorities, and on such other and further evidence as may be presented at the hearing in this matter.

Respectfully submitted,

JAMES R. DUNN
Federal Public Defender

DATED: October 14, 1980

By _____
VICTOR B. KENTON
Deputy Federal Public Defender
Attorneys for Defendant
JAMES F. CURRID

DECLARATION OF VICTOR B. KENTON

I, VICTOR B. KENTON, hereby declare and state as follows:

1. I have personal knowledge of the following facts, and if sworn as a witness, could competently testify thereto. I am the attorney of record for the defendant, JAMES E. CURRIE, in this action.

2. On April 23, 1980, the United States Attorney for the Central District of California filed a misdemeanor Information against James E. Currie, charging a violation of 18 United States Code 641, illegal sale of government property, having a value of less than $100.00. Mr. Currie did not appear at his Arraignment before the Magistrate on April 28, 1980, since he was at that time, unknown to the Government, incarcerated at Los Angeles County Jail. When the Government discovered this, he was brought in for Arraignment on the misdemeanor Information on August 25, 1980. On that date I was appointed as counsel for Mr. Currie, who elected to proceed before the Magistrate. The Court of Magistrate Tassopulos was drawn, and the case was set for jury trial on October 7, 1980, at 9:00 a.m. Motions were due to be filed by September 23, 1980, with the Government response by September 30th, and Motions to be heard on the date of trial.

3. Assistant United States Attorney Layn Phillips was assigned to prosecute this case for the Government. Since he was new to the office, and did not arrive until September 7, 1980, it was not until shortly after that date that I had my first discussion with the Government about this case. I requested the Government to provide me with discovery, and I received certain documents

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(5)

on September 11th. Between September 11th and September 19th, I had additional discussions with Mr. Phillips regarding the discovery provided, and my requests for additional discovery. None of those discussions in any manner involved any form of plea bargaining or plea negotiation. To the best of my recollection, Mr. Phillips did inquire of me whether the case would definitely go to trial. I responded that I would review the discovery material with my client to determine whether there was any possibility that he did not wish to proceed with trial.

4. On or about September 17, 1980, I informed Mr. Phillips that the case would be proceeding to trial. On that same day, I sent a written memorandum to the Court Clerk, Ralph Klein, stating that I needed additional time to file motions, in view of my own heavy trial schedule during that week. At that time, I made additional discovery requests of Mr. Phillips.

5. The next day, September 18, 1980, I received a written memorandum from Mr. Phillips responding to my additional discovery requests to provide additional information. That memorandum also indicated the Government's position in regard to impeachment of Mr. Currie under Federal Rule of Evidence (609), and other matters. A true and correct copy of that memorandum is attached to this Declaration as Exhibit A.

6. On September 19, 1980, I sent a written request to Mr. Phillips for further Discovery. A true and correct copy of that written request is attached hereto as Exhibit B.

7. After sending this memorandum on September 19th, I had a telephone conversation with Mr. Phillips. At that time, he stated that the Government would be superseding the misdemeanor Information

(6)

with a felony Indictment. Mr. Phillips stated that the decision by the Government to supersede with a felony Indictment was unrelated to my client's decision to proceed to trial; however, he stated that upon my informing him that the case would definitely be going to trial, he carefully reviewed the statutes involved, and the facts of the case, and determined that a felony Indictment would be appropriate. He further offered to permit my client to plead guilty to a misdemeanor Information, and stated that this offer would remain open until September 27, 1980, Mr. Phillips sent me a memorandum summarizing this conversation, a true and correct copy which is attached hereto as Exhibit C.

8. Prior to September 19, 1980, as noted from the facts set forth in this Declaration, Assistant United States Attorney Phillips and I had discussed this case on numerous occasions, on issues ranging from discovery requests to the position of the Government regarding impeachment for prior felony or other convictions. Further, the felony Indictment is based on the exact same set of facts as the misdemeanor Information. No further facts or information came to the Government's attention from the time the misdemeanor Information was filed, April 23, 1980, until the date the Government decided unilaterally to supersede with a felony Indictment, on September 19, 1980. Only one day after I informed the Government that there was no possibility of Mr. Currie entering a plea of guilty, the Government superseded with its felony Indictment.

I declare under penalty of perjury that the foregoing is true and correct and was executed this 15th day of October, 1980, at Los Angeles, California.

VICTOR B. KENTON
Deputy Federal Public Defender

to show that those are intervening circumstances.

The burden is very heavy on the government when it has information in its file --

THE COURT: Well, the burden is heavy, but that merely has to do with whether the burden is discharged. It doesn't have anything to do with the ultimate question, which is, on the record made, is it fairly to be said that there was vindictiveness or is it fairly to be said it had the appearance of vindictiveness on the one hand or, on the other hand, that there was some one of these other nonvindictive, and reasonably to be viewed as not appearing to be vindictive, explanations of why the United States attorney proceeded as he did.

And that is what is presented to a court every time that we have one of these motions. It isn't easy. But that is what it is.

MR. RENTON: Yes, Your Honor.

I would respond as follows: That, first, the government only contends that it incorrectly charged Mr. Currie, not that it didn't realize it could have charged him back in April with a felony.

My offer of proof would be that, number one, Mr. Fredrick Flam, Assistant United States Attorney, was the assistant United States attorney in charge of

bringing this case; that he had before him the documents referred to in Exhibits A through G of the stipulation;

That he considered those documents and that he made a voluntary and conscious choice, after considering that evidence, to charge Mr. Currie in an information under 18 U.S.C. Section 641 as a misdemeanor rather than as a felony;

That that was not -- that his testimony would be that that was not a decision -- strike that -- that he was not unaware at the time that Section 641 could have been charged as a felony through the indictment process.

THE COURT: What do you say to that, Mr. Kendall? Is there some factual dispute between you in that regard?

MR. KENDALL: No, Your Honor. I don't think there would be a factual dispute on that, but --

THE COURT: Very well. That is all I want to know.

All right. Mr. Kenton, what further?

MR. KENTON: I just have one further point, Your Honor, and that is that this case is not a Bordenkircher case.

The government continually ignores the fact

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-1849

UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES EDWARD CURRIE

CERTIFICATE OF SERVICE

James R. Dunn, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the within Motion for Leave to Proceed in Forma Pauperis and the Respondent's Brief in Opposition on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the counsel for Petitioner by enclosing a copy thereof in an envelope, first-class postage prepaid, addressed to:

Honorable Rex E. Lee
Solicitor General
Department of Justice - Room 5143
Washington, D. C. 20530

Richard Kendall, Esq.
Assistant United States Attorney
1200 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

and depositing same in the United States mails in Los Angeles, California, on May 26, 1982, and further certifies that all parties required to be served have been served.

JAMES R. DUNN
Federal Public Defender
For the Central District of California
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-2854
(FTS) 796-2854

OFFICIAL SEAL
ZOILA DU BOIS
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires July 29, 1983

ZOILA DU BOIS
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, the undersigned, declare: that I am a citizen of the United States and a resident and employed in Los Angeles County, California; that my business address is the Federal Public Defender's Office, United States Courthouse, 312 North Spring Street, Room 1503, Los Angeles, California; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit, at whose direction the service by mail was made to:

Honorable Rex E. Lee Solicitor General Department of Justice Washington, D.C. 20530	Office of the Clerk Supreme Court of the United States Washington, D. C. 20543	Assistant U. S. Attorney U. S. District Court 1200 U. S. Courthouse Los Angeles, CA 90012

a copy of : RESPONDENT'S BRIEF IN OPPOSITION

No. 81-1849 JAMES EDWARD CURRIE

This certificate is executed on the date shown below, at Los Angeles, California.

Teresa Lopez

TERESA LOPEZ

Date of Execution:
May 26, 1982

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JUN 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1849

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES EDWARD CURRIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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18 U.S.C. 641 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1849

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES EDWARD CURRIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We have contended in the petition that this case presents two questions that warrant this Court's review. First, this case presents the same question pending before the Court in *United States* v. *Goodwin*, No. 80-2195 (argued Apr. 21, 1982), concerning the extent to which presumptions of "vindictiveness" and prophylactic rules apply at the pretrial stage of a criminal prosecution. Second, this case raises the same question considered in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), which held that the prosecutor may present the accused with the choice of pleading guilty to charges initially preferred against him or standing trial on enhanced charges. In opposing our petition, respondent contends that review should be denied because this case is distinguishable in relevant respects from both *Goodwin* and *Hayes*. There is no merit to this assertion.

1. Respondent does not disagree with our submission (Pet. 9) that this case will be directly controlled by *Goodwin* if the Court holds that presumptions of vindictiveness and prophylactic rules have no application in the pretrial context. Nor does respondent dispute our showing that the decision below is in direct conflict with *United States* v. *Ruppel*, 666 F. 2d 261, 266-267 (5th Cir. 1982), wherein the Fifth Circuit held that the mere election of the accused to stand trial "is by itself insufficient to place on the prosecutor the burden of demonstrating the absence of vindictiveness" in the filing of enhanced charges. Instead, respondent simply assumes that the prophylactic rule of *Blackledge* v. *Perry*, 417 U.S. 21 (1974), is fully applicable in the pretrial context. Respondent also asserts that the indictment here was properly dismissed because the courts below found that the prosecutor's denial of vindictiveness was "false" (see Opp. 8-9). In so arguing, respondent misstates the record.

Neither the district court nor the court of appeals found that the prosecutor was actually motivated by vindictiveness. To the contrary, the district court dismissed the superseding indictment without rendering any finding of fact or conclusion of law on the "vindictiveness" issue (Pet. App. 7a). Moreover, in so doing, the district court expressly noted that "the factual matters * * * here are not in dispute" (Oct. 31, 1980 Tr. 28). Thus, the clear basis for the district court's dismissal order was not that the prosecutor acted with actual vindictiveness, but that—even if credited—the prosecutor's denial of vindictive motivation was insufficient to meet the "substantial[] * * * burden" of dispelling the appearance of vindictiveness once increased charges are filed (see *id.* at 15-16).[1]

---

[1]Several days after it dismissed the superseding indictment against respondent, the district court stated (Opp. App. C 48a), in connection with another motion, that it believed that the government's motive in obtaining the superseding indictment was to make respondent "go to

Likewise, the court of appeals did not find that the prosecutor acted vindictively. The court of appeals simply relied (Pet. App. 4a) on its earlier decision in *United States* v. *Alvarado-Sandoval*, 557 F. 2d 645 (9th Cir. 1977). In *Alvarado-Sandoval*, the Ninth Circuit held that mere "[a]ppearance of vindictiveness * * * is the touchstone," and that an increase in charges occurring "after" the defense makes pretrial procedural motions will give rise to a due process violation (*id.* at 645-646). Thus, the court of appeals has affirmed dismissal of the superseding indictment in this case simply because it was obtained after respondent exercised a procedural right—and without regard to the sufficiency of the prosecutor's explanation for his actions.

The present case therefore stands on the same footing as *Goodwin*. Here, as in *Goodwin*, the increased charge was brought by a successor prosecutor while preparing a misdemeanor case for trial. In each case, the prosecutor decided that enhanced charges were warranted based upon a reassessment of the gravity of the defendant's conduct and the extent of his prior criminal activities. And, in each case, the court of appeals held that the successor prosecutor's explanation of non-vindictive justifying factors was insufficient to overcome the presumption of vindictiveness inherent in the filing of increased charges.[2]

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trial on the toughest charges they could make" if he insisted on standing trial. However, the district court did not explain why this would constitute impermissible "vindictiveness," or why the prosecutor's actions were not entirely consistent with *Bordenkircher* v. *Hayes, supra.*

[2]To bolster his claim, respondent argues that mistakes in the original information "did not necessitate an increase in charges" (Opp. 7). This contention is beside the point. The question is not whether the filing of the felony charge was "necessary," but whether it was warranted by non-vindictive factors. As we have shown in our petition (Pet. 3-4), respondent's theft of a Treasury check valued at $317 clearly fell within the felony provision of 18 U.S.C. 641, and fully warranted enhanced charges.

Accordingly, if the Court in *Goodwin* holds either that there is no presumption of vindictiveness in the pre-trial context, or that the prosecutor's explanation of non-vindictive motivating factors is sufficient to rebut an appearance of vindictiveness, the decision in this case should be vacated and remanded.[3]

2. Respondent also argues (Opp. 10-15) that this Court's holding in *Hayes* has no application to this case because the prosecutor's threat of increased charges was made after the accused elected to stand trial rather than at the very outset of the prosecution. However, as we have pointed out in our petition (Pet. 16), "the chronology of events in which the prosecutor enhanced [the charges against the defendant] is not decisive." *Ehl* v. *Estelle*, 656 F. 2d 166, 171 (5th Cir. 1981).

In *Hayes*, this Court held that a prosecutor may constitutionally present the accused with the "unpleasant alternatives" of pleading guilty to a lesser charge or standing trial

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[3]Respondent also asserts (Opp. 7-8) that the original prosecutor here was "experienced" and had access to all pertinent information at the time the misdemeanor charge was filed. In our view, a successor prosecutor always should be able to reevaluate the case in light of a more careful analysis of the facts to determine whether the original charges are appropriate. The validity of this reevaluation does not turn on the relative experience of the initial prosecutor. As the cases that we have cited (Pet. 13) make clear, the correction of a mistake or oversight is sufficient to negate a vindictiveness claim irrespective of the experience of the original prosecutor.

Respondent also argues that our submission concerning the inapplicability of a "presumption" of vindictiveness in the pretrial context was not raised in the court of appeals. However, the government was bound by the Ninth Circuit's prior decisions—which liberally indulged presumptions of vindictiveness—when this case initially was presented to the panel of the court of appeals. When the government petitioned for rehearing and suggested rehearing en banc, it argued that no presumption of vindictiveness should be recognized in the pretrial stage based merely on the "temporal coincidence" of increased charges and the exercise of a procedural right (Pet. 13-15).

on enhanced charges (434 U.S. at 365). So long as the accused has been "fully informed of the true terms of the offer" and "is free to accept or reject" it, there is no due process violation (*id.* at 360, 363). Here, the prosecutor accompanied the filing of enhanced charges with an offer to accept a guilty plea on the original misdemeanor information; the prosecutor renewed that plea offer to afford respondent adequate time to fully consider it. Hence, as even respondent recognizes (Opp. 10, 12), he was faced with the same sort of unpleasant alternative as the defendant in *Hayes*: "pleading guilty to the misdemeanor or going to trial on a *felony*" (*id.* at 12). In short, there is no substantive difference between the situation here and the situation where a grand jury returns a felony indictment at the outset and the prosecutor offers to drop the charge in return for a guilty plea on a misdemeanor charge. See *Hayes, supra*, 434 U.S. at 360-361.

For the foregoing reasons, and for the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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